Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 76-451

ALABAMA POWER COMPANY,

Petitioner,

V.

RAYMOND E. DAVIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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V.

RAYMOND E. DAVIS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Alabama Power Company, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in this proceeding.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, not officially reported, is set forth in Appendix A hereto on page 1a. The opinion of the United States District Court for the Northern District of Alabama is reported at 383 F.Supp. 880 (N.D. Ala. 1974), and is set forth in Appendix B on page 4a.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on July 1, 1976. This petition for Writ of

Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1970).

QUESTIONS PRESENTED

1. Do the seniority provisions of the Military Selective Service Act require military service to be credited in computing the amount of retirement income under privately-funded pension plans even though under such pension plans the amount of retirement income is dependent upon a substantial work requirement?

This case also involves the following subsidiary issue:

2. Whether respondent's claim is barred by the appropriate state statute of limitations for such action or, in the alternative, by laches?

STATUTES INVOLVED

1. The Military Selective Service Act § 9, ch. 625, § 9, 62 Stat. 614 (1948) [50 U.S.C. App. § 459 (1970)], *as amended* 38 U.S.C. § 2021 (1974).

2. 1940 Code of Alabama (Recomp. 1958), Title 7, § 21.

3. 1940 Code of Alabama (Recomp. 1958), Title 7, § 26.

STATEMENT OF THE CASE

On August 13, 1973, Raymond E. Davis ("Davis"), respondent herein, brought this action in the United States District Court for the Northern District of Alabama, Southern Division, for injunctive relief to compel petitioner, Alabama Power Company ("Alabama Power"), to grant Davis Accredited Service for purposes of computing retirement income under Alabama Power's Pension Plan for the period of time Davis was on military leave of absence from employment with Alabama Power. Davis' claim was asserted under the Military Selective Service Act, 50 U.S.C. App. § 459

(1970) upon which jurisdiction of the court of first instance was based.[1]

Davis was first employed by Alabama Power on August 16, 1936, in a position other than temporary and continued to be employed until March 18, 1943, when he left to perform

---

1. The "Vietnam Era Veterans' Readjustment Assistance Act of 1974," P.L. 93-508, 88 Stat. 1578 (December 3, 1974) has recodified these provisions in 38 U.S.C. § 2021.

The section of the Military Selective Service Act involved in this case, 50 U.S.C. App. § 459 (1970) is set out in full in Appendix C, at page 29a. The provisions of that section which are applicable to this case are as follows:

(b) Reemployment Rights.

In the case of any such person who, in order to perform such training and service, has left or leaves a position . . . in the employ of any employer and who . . . (2) makes application for reemployment within 90 days after he is relieved from such training and service . . .

* * *

(B) If such position was in the employ of a private employer, such person shall—

(i) if still qualified to perform the duties of such position, be restored by such employer or his successor in interest to such position or to a position of like *seniority, status* and *pay*; . . .

* * *

(c) Service Considered as Furlough or Leave of Absence.

(1) Any person who is restored to a position in accordance with the provisions of paragraph . . . (B) of subsection (b) [of this section] shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored *without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at such time such person was inducted into such forces,* and shall not be discharged from such position without cause for one year after such restoration.

(2) It is declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph 9 . . . (B) of subsection (b) [of this section] should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment. (Emphasis Added)

military service beginning on March 30, 1943, with the Armed Forces of the United States. On October 1, 1945, Davis honorably completed his military service and was reinstated by Alabama Power on October 8, 1945. Davis continued in that employment until June 1, 1971, at which time he retired from employment with Alabama Power.

On July 1, 1944, Alabama Power established a Pension Plan for its employees. A copy of this Pension Plan as amended to and including the amendment of January 1, 1971, appears in Appendix D, at page 33a.

With respect to treatment of military service, except for certain provisions not applicable to Davis,[2] the Pension Plan has at all times provided that periods of "leaves of absence without regular pay" and military service do not constitute Accredited Service as defined in the Pension Plan. (See Sections II.2 and III of the Pension Plan).

All contributions to the "Pension Plan Trust Fund" are made by Alabama Power. The amount of these contributions is determined annually on an actuarial basis taking into account factors including, among others, the number of full-time regular employees of Alabama Power who are covered by the Pension Plan, their Accredited Service, and their earnings.

All *full-time regular* employees of Alabama Power who have completed one year of service with Alabama Power and attained the age of twenty-five (25) years are included in the Pension Plan. Pursuant to established directives and practices of Alabama Power, a full-time regular employee is one who is employed on a full-time basis for an indefinite period of time. The full-time regular work week of Alabama Power

2. The amendment of January 1, 1966, allows veterans to substitute service with Alabama Power prior to the employee's twenty-fifth (25th) birthday, less one qualifying year, as "Accredited Service" for certain designated military service time including the period of Davis' military service (See § III(3)(a) of the Plan). This provision, however, did not affect Davis since he had no service with Alabama Power prior to his attaining twenty-five years of age.

consists of forty (40) hours per week and regular daily work consists of eight (8) scheduled hours of work per day.

Davis' Accredited Service under the Pension Plan commenced August 16, 1937, one year after his employment date. Davis accrued Accredited Service from such date until June 1, 1971, when he retired, except for the time spent in military service and a period of time Davis participated in a union strike. When Davis retired he received $198.95 per month retirement income under Alabama Power's Pension Plan. Had Davis received Accredited Service for his period of military service, he would have been entitled to $216.06 per month.[3]

On December 20, 1972, Davis filed an action seeking to have his military service computed as Accredited Service under Alabama Power's Pension Plan. The case was tried without a jury in the United States District Court for the Northern District of Alabama. The court held that the computation of the income under Alabama Power's Pension Plan was a perquisite of seniority, and therefore Davis' period of military service must be treated as Accredited Service for the purpose of computing retirement income.

On July 1, 1976, the Court of Appeals for the Fifth Circuit affirmed the order of the District Court. Your petitioner seeks a Writ of Certiorari to review this judgment.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit Court of Appeals has rendered a decision in direct conflict with the decisions of the Third

3. Davis' retirement income was based upon § V.4(ii) of the Pension Plan. The computation of the amount of his benefits, with certain adjustments, is based upon his years of Accredited Service. § III.1 and § II.1 provide that only full-time regular employees of Alabama Power can be credited with "Accredited Service." A full-time regular employee is one who is scheduled to work 40 hours per week, and regular daily work consists of eight scheduled hours work per day. See Memorandum Opinion of District Court in Appendix B at page 4a. A full-time employee is expected to work a forty-hour week throughout the year, except for certain periods of off-time for which he receives Accredited Service.

and Tenth Circuit Courts of Appeal on a question of federal law which has not been, but should be, settled by this Court.

The affirmance of the trial court's opinion by the Fifth Circuit Court of Appeals has created an open and irreconcilable split among the Circuit Courts of Appeal on the precise question presented in this case, that is:

> Do the seniority provisions of the Military Selective Service Act require military service to be credited in computing the amount of retirement income under privately-funded pension plans even though under such pension plans the amount of retirement income is dependent upon a substantial work requirement?

This split among the Circuit Courts of Appeal was recognized by Judge Roney in his dissent from the majority opinion of the Fifth Circuit Court of Appeals wherein he stated:

> "I respectfully dissent. All leaves of absence without regular pay are excluded from Accredited Service under Alabama Power Company's Pension Plan. The result reached by the district court accords greater benefits to an employee per leave of absence for military service than for any other leave of absence without pay. Like the Third and Tenth Circuits, I would hold that the benefits provided by the Pension Plan are not prerequisites of seniority under the Act. 50 U.S.C. App. § 549(c)(1) (1970). *See Litwicki v. Pittsburgh Plate Glass Ind., Inc.*, 505 F.2d 189 (3rd Cir. 1974); *Jackson v. Beech Aircraft Corp.*, 517 F.2d 1322 (10th Cir. 1975). I would reverse."

Both the Third and Tenth Circuit Courts of Appeal have held that retirement benefits under the respective pension plans being considered were not "perquisites of seniority" but rather represented deferred compensation based upon a substantial work requirement. *Jackson v. Beech Aircraft Corp.*, 517 F.2d 1322 (10th Cir. 1975); *Litwicki v. Pittsburgh Plate Glass Indus., Inc.*, 505 F.2d 189 (3rd Cir. 1974). The courts in both *Litwicki* and *Jackson* held that the Military Selective Service Act does not require credit to be given under the respective pension plans for military service.

The majority opinion of the Fifth Circuit Court of Appeals in the present case is directly contrary to the above decisions of the Third and Tenth Circuits and will unavoidably inject, on a nationwide basis, confusion, uncertainty, and conflict in the orderly administration of pension plans. This case thus raises a compelling issue of critical importance to the operation and integrity of these plans. It presents to this court, *for the first time*, a major question involving the proper treatment of "pension benefits" as they relate to rights guaranteed to veterans under the Military Selective Service Act.

The soundness of privately-funded pension plans is dependent, to a great extent, upon consistent, stable and uniform application of the provisions of particular pension plans. The trustees of the pension plan funds, acting in their fiduciary capacities, are greatly hampered in administering claims such as Davis' because of the contradictions among the various courts of appeals with respect to the proper application of the Military Selective Service Act. The impact of this confusion and contradiction is demonstrated in the present case where the immediate and direct effect upon Alabama Power, if the opinion of the Fifth Circuit Court of Appeals is allowed to stand, is that, contrary to the clear provisions of the Pension Plan and contrary to the historical method of funding the plan, Alabama Power must increase the amount of respondent's pension benefit by including military service time as Accredited Service under the Pension Plan. Since the decision of the Fifth Circuit Court of Appeals dramatically alters long accepted standards for funding pension plans and creates critical problems in payment of claims for which no monies were funded during the existence of the plans, it is crucial for this Court to accept this Petition and decide the proper relationship between pension benefits and veteran's rights under the Military Selective Service Act.

A decision by this Court is the only method of obtaining the necessary uniformity and stabilization required for the proper administration of privately-funded pension plans.

Until this Court finally decides the question presented, all employers employing veterans will be faced with a lack of definite guidelines in the funding and administration of their pension plans. Trustees of such plans will be reluctant to discharge their fiduciary responsibilities. Moreover, decisions with regard to payment of claims under these funds could hinge upon the residence of the particular claimant. For example, an employee of Alabama Power may, after retirement, move to a state located within the Third or Tenth Circuits, and make a claim for pension benefits which include his military service time. It is entirely possible that Alabama Power could be placed in a position of paying one claim and denying another under same pension plan, where the sole difference in the claim is the location of the claimant. This type of uncertainty, inequity, and absurd result should not be allowed to develop. Of importance is that Alabama Power is not alone in these circumstances. Many pension plans are interstate in nature with the same pension plan covering employees located in many states. Presumably, some of the employees under the same pension plan now reside and work in various circuits of the United States including the Third, Tenth and Fifth Circuits. Surely, any entitlement to increased pension benefits based on the Military Selective Service Act, which is applicable throughout the United States, should not be dependent upon whether the claimant resides within the Fifth Circuit as opposed to the Third or Tenth Circuits. Likewise employers funding these plans, whether located within the Tenth, Third or Fifth Circuits or elsewhere, should not be faced with uncertainties concerning the validity of a veteran's claim to be credited with pension benefits for time spent in the military service.

The conflict between the Fifth Circuit Court of Appeals on one hand and the Third and Tenth Circuit Courts of Appeal on the other it is clear and direct. In *Litwicki v.*

Pittsburgh Plate Glass Indus., Inc., supra, the Court of Appeals for the Third Circuit made it clear that the existence of a true work requirement as a perquisite to pension benefits, is inconsistent with accrual of the benefit by mere longevity. There, the plaintiff, a veteran, sued his employer, Pittsburgh Plate Glass Industries, Inc., claiming that for purposes of vesting and for purposes of computing the amount of pension benefits, credit must be given under the pension plan for the entire time plaintiff spent in military service. In affirming the District Court judgment against the plaintiff, the Third Circuit Court of Appeals stated:

> "Under the pension agreement at issue on the present appeal, both the vesting and amount of an employee's pension benefits are determined with reference to the years of 'continuous service' which he has accumulated. In contrast to the situation in *Accardi*, a year's 'continuous service' normally cannot be earned unless the employee actually works a substantial number of hours as specified in the pension agreement. A year's credit under the pension agreement as amended in 1964, for example, represents some 1500 hours of work performed in the plants. This work requirement is inconsistent with an intent to accord pension benefits on the basis of an employee's longevity with PPG.
>
> "We do not believe that the basic intent of the pension agreement is altered materially by the provisions which credit an employee with 'continuous service' while absent from work. The exception for jury duty, by its very nature, can provide 'continuous service' credit only during infrequent and generally short periods of absence. The exceptions to the work requirement which give credit for holding specified union offices, military service, and absence caused by work-related injury or disease provide a relatively small proportion of the total 'continuous service' credit earned. *Far more pervasive exceptions would be necessary to undermine the substantial work requirement embodied in this pension agreement.*

* * *

> *"Our analysis of this pension agreement leads us to the firm conclusion that the benefits therein, provided are not perquisites of seniority under the Act. These pension benefits essentially are deferred compensation based upon a substantial work requirement.* Thus we hold that, neither for purposes of vesting nor for purposes of calculating amount of pension benefits, does the Act require that credit be given for military service. . . ." (Emphasis supplied) 505 F.2d at 192-193.

Similarly, the Tenth Circuit Court of Appeals in *Jackson v. Beech Aircraft Corp., supra,* had before it a pension plan which expressly excluded military service from "years of service" in determining the amount of pension benefits. There, the plaintiffs brought their action under the Military Selective Service Act and claimed that time spent in military service should be included for purposes, among others, of computing retirement income benefits. After reviewing the decision in *Litwicki v. Pittsburgh Plate Glass Indus., Inc., supra,* the Tenth Circuit Court of Appeals in holding that the retirement benefits under the pension agreement were not perquisites of seniority stated:

> "In the instant case we, too, are of the view that the retirement income benefits provided by the plan are not a form of seniority, as such, but are based on a substantial work requirement. Accordingly, we hold that the Act does not require that Jackson and Tolbert be given credit for time spent in the military in computing the amount of their retirement benefits." 517 F.2d 1326.

In addition to the decisions of the Third and Tenth Circuit Courts of Appeal, this question also has been considered by two other district courts. The District Court for the Northern District of Ohio in *LaPinta v. Ohio Crankshaft Division, Park-Ohio Indus., Inc.*, 77 CCH Labor Cases ¶ 11,156 (N.D. Ohio 1975) (not officially reported), held that the computation of pension benefits was based upon a substantial work requirement and therefore the plaintiff, employee, was not entitled to credit for his time spent in military service. The District Court for the Northern District of Ohio is consistent

with the decisions of the Third and Tenth Circuit Courts of Appeal.

Other than the present case, the only decision holding that pension benefits were perquisites of seniority, despite an apparent work requirement, was rendered in *Smith v. Industrial Employers and Distributors Ass'n.*, 385 F.Supp. 1281 (N.D. Cal. 1974). The decision in *Smith* was rendered prior to the appellate decisions rendered in *Litwicki* and *Jackson* and such decision is presently on appeal to the Ninth Circuit Court of Appeals.

As in *Jackson, Litwicki* and *LaPinta,* under Alabama Power's Pension Plan, it is clear that accrual of Accredited Service is based upon a substantial work requirement in that an absolute requirement for accrual of Accredited Service is that an employee be employed on a full-time regular basis. Employment on a full-time regular basis is employment on a forty-hour per week work schedule. There is no difference in the facts presented in the present case from those in *Jackson, Litwicki* or *LaPinta* which justify contrary conclusions. Your petitioner earnestly requests that this Court accept this Petition and resolve the split among the Circuits with respect to the question presented.

While the question of whether certain employee benefits under specific factual backgrounds constitutes seniority under the Military Selective Service Act has been decided by this Court on previous occasions, *e.g., Foster v. Dravo Corp.*, 420 U.S. 92 (1975) (vacation pay); *Edgar v. Magma Copper Co.*, 389 U.S. 332 (1967) (vacation pay); *Accardi v. Pennsylvania R. R. Co.*, 383 U.S. 225 (1966) (severance pay); the important question of the proper treatment of pension benefits under the Military Selective Service Act has not been decided previously by this Court. The urgent need for a decision by this Court on this issue is clear.

Although it is the position of petitioner that nothing in the Act seeks to elevate a veteran to a special and privileged position with respect to employment benefits which must be earned, and that the decision of the Fifth Circuit should

be reversed, for purposes of this Petition, petitioner respectfully submits that this Petition should also be granted and a decision rendered by this Court in order to permit equal treatment to the *veterans* themselves without regard to location of the Circuit in which the veteran resides.

SUBSIDIARY ISSUE

While the foregoing constitutes petitioner's reasons for granting the writ, petitioner also requests the Court to review and reverse the lower court's opinion that the applicable Alabama statute of limitations does not bar Davis' suit. The District Court rejected the argument of Alabama Power that the Alabama one-year statute of limitations barred Davis' suit and held that the claim of Davis was equitable in nature. In the alternative, the District Court held that the Alabama six-year statute of limitations applied, and that the claim did not accrue until Davis retired on June 1, 1971.[4] It is respectively submitted that the Fifth Circuit, in affirming the District Court's opinion, erroneously applied the law to the facts in this case, and that existing case law requires that this case be reversed on the basis that the one-year statute of limitations operates to bar the claim of Davis. *Blair v. Page Aircraft Maintenance, Inc.*, 467 F.2d 815 (5th Cir. 1972), *rev'g.* 336 F.Supp. 1011 (N.D. Ala. 1971); see *Bell v. Aerodex, Inc.*, 473 F.2d 869 (5th Cir. 1973).

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4. 1940 Code of Alabama (Recomp. 1958), Title 7, § 21, provides in part as follows:

> "§ 21 . . . *Limitation of six years.* — The following must be commenced within six years:
>
> * * *
>
> Actions upon any simple contract or specialty, not herein specifically enumerated."

1940 Code of Alabama (Recomp. 1958), Title 7, § 26, provides in part as follows:

> "§ 26 . . . *Limitation of one year.* — The following must be commenced within one year:
>
> * * *
>
> Actions for any injury to the person or rights of another, not arising from contract, and not herein specifically enumerated."

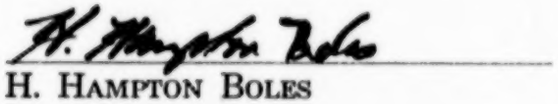
CONCLUSION

The Court of Appeals for the Fifth Circuit erred in affirming the opinion that the pension benefits in the instant case were "perquisites of seniority", and that time spent in the military must be counted as Accredited Service for the purpose of computing such pension benefits.

For the foregoing reasons, a writ of centiorari should be issued to review the decision of the Fifth Circuit Court of Appeals.

This 28th day of September, 1976

Respectfully submitted,



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PROOF OF SERVICE

I, H. Hampton Boles, one of the attorneys for Alabama Power Company, petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 28th day of September, 1976, I served copies of the foregoing Petition for Writ of Certiorari on the several parties thereto, as follows:

1. On the United States, by leaving three copies thereof at the office of Wayman G. Sherrer, Esquire, United States Attorney for the Northern District of Alabama, Federal Building, Birmingham, Alabama, and by mailing three copies in a duly addressed envelope, with first-class postage prepaid, to Robert E. Kopp, Appellate Section, Civil Division, Department of Justice, Washington, D.C. 20530.

2. On the Solicitor General, by mailing three copies in a duly addressed envelope, with first-class postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C. 20530.

3. On the Department of Labor, by mailing three copies in a duly addressed envelope, with first-class postage prepaid, to William H. Berger, Esquire, Department of Labor, Washington, D.C. 20210.

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 74-4149

RAYMOND E. DAVIS,

Plaintiff-Appellee,

v.

ALABAMA POWER COMPANY,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Alabama

(July 1, 1976)

Before AINSWORTH, MORGAN and RONEY, Circuit Judges.

PER CURIAM:

AFFIRMED on the basis of the well-reasoned opinion of District Judge Guin published in 383 F. Supp. 880 (1974).

RONEY, Circuit Judge, dissenting:

I respectfully dissent. All leaves of absence without regular pay are excluded from Accredited Service under Alabama Power Company's Pension Plan. The result reached by the district court accords greater benefits to an employee per leave of absence for military service than for any other leave of absence without pay. Like the Third and Tenth Circuits, I would hold that the benefits provided by the Pension Plan are not prerequisites of seniority under the Act. 50 U.S.C. App. § 459(c) (1) (1970). *See Litwicki v. Pittsburgh Plate Glass Ind., Inc.*, 505 F. 2d 189 (3d Cir. 1974); *Jackson v. Beech Aircraft Corp.*, 517 F. 2d 1322 (10th Cir. 1975). I would reverse.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 74-4149

D. C. Docket No. CA 72-1123-S

RAYMOND E. DAVIS,
Plaintiff-Appellee,

versus

ALABAMA POWER COMPANY,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Alabama

Before AINSWORTH, MORGAN and RONEY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendant-appellant pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

July 1, 1976

RONEY, Circuit Judge, dissenting.
Issued as Mandate: July 23, 1976.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

RAYMOND E. DAVIS, Plaintiff,	)	
vs.	)	CIVIL ACTION
ALABAMA POWER COMPANY,	)	NO. 72-1123-S
Defendant.	)	

ORDER

In conformity with and pursuant to the Memorandum Opinion of the Court contemporaneously filed herewith, it is

ORDERED, ADJUDGED and DECREED that judgment be entered in favor of the plaintiff and against the defendant in the matter of establishing the plaintiff's seniority status, entitling said plaintiff to an appropriate award to compensate him for the loss of $17.11 per month due from past pension payments, and to a mandatory injunction requiring defendant to increase the plaintiff's present pension payment from $198.95 per month to $216.06 per month, as to all future installments of said pension.

It is further ORDERED, ADJUDGED and DECREED by the Court that the defendant pay directly to the attorneys of record for the plaintiff the proceeds of the judgment and the costs recovered herein by the plaintiff, and upon receipt thereof the attorneys of record for the plaintiff will satisfy the said judgment upon the records of this Court.

Done this 28th day of December, 1973.

/s/ J. Foy Guin, Jr.

UNITED STATES DISTRICT JUDGE
J. Foy Guin, Jr.

Raymond E. DAVIS, Plaintiff,
v.
ALABAMA POWER COMPANY,
Defendant.

Civ. A. No. 72-G-1123-S.

United States District Court,
N. D. Alabama, S. D.
Sept. 11, 1974.

MEMORANDUM OPINION

GUIN, District Judge.

The plaintiff, Raymond E. Davis, in this non-jury proceeding, is a World War II armed forces veteran who temporarily left his employment with the defendant, Alabama Power Company, to serve his country during war time. This plaintiff asserts, pursuant to the Military Selective Service Act,[1] that the period of time spent in the service of his

1. 50 U.S.C.App. § 459 (§ 8 of original act) in pertinent part provides:

(b) Reemployment rights

In the case of any such person who, in order to perform such training and service, has left or leaves a position (other than a temporary position) in the employ of any employer and who (1) receives such certificate, and (2) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

* * * * *

(B) if such position was in the employ of a private employer, such person shall—

(i) if still qualified to perform the duties of such position, be restored by such employer or his successor in interest to such position or to a position of like seniority, status, and pay; or

(ii) if not qualified to perform the duties of such position by reason of disability sustained during such service but qualified to perform the duties of any other position in the employ of such employer or his successor in interest, be restored by such employer or his successor in interest to such other position the duties of which he is qualified to perform as will provide him like seniority,

country should be held, by this court, to be "accredited service" for purposes of computing retirement pension benefits under the defendant's retirement program.

The defendant, Alabama Power Company, on the other hand, ardently maintains that: (1) because the company's pension policy denies all other employees, who were on furlough or leave of absence without regular pay, the right to accredited service, that it would be contrary to the company's overall policy to bestow accredited service to those called to serve their country where no actual work had been done for the company during such period of service; (2) it would be unconstitutional to require the defendant to grant the plaintiff increased retirement income based upon a period of time in which the plaintiff performed no work; (3) the

status, and pay, or the nearest approximation thereof consistent with the circumstances in his case,
unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

* * * * *

(c) Service considered as furlough or leave of absence

(1) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) [of this section] shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

(2 It is declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) [of this section] should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.

(3) Any person who holds a position described in paragraph (A) or (B) of subsection (b) [of this section] shall not be denied retention in employment or any promotion or other incident or advantage of employment because of any obligation as a member of a reserve component of the Armed Forces of the United States.

plaintiff's claim for relief is barred by the one-year Alabama statute of limitations, Ala. Code (Recomp. 1958), tit. 7, § 26, or by the six-year Alabama statute of limitations, Ala. Code (Recomp. 1958), tit. 7, § 21, or by the equitable doctrine of laches.

STATEMENT OF FACTS

The pertinent facts, which were stipulated by the parties and the uncontradicted testimony of the one witness, are as follows:

The plaintiff commenced his employment with the defendant on August 16, 1937; after having worked for the defendant for a period of seven years, the plaintiff, on March 18, 1943, temporarily left that employment to serve the cause of his country in the military. The plaintiff honorably served our nation and was discharged on October 1, 1945. On October 8, 1945, the plaintiff was reinstated with the defendant and continued that employment until he retired on June 1, 1971. Thus, the time period involved in this suit is the two-year, six-month and 20-day period in which this World War II veteran plaintiff temporarily left the employment of the defendant to serve in the defense of his country. The plaintiff is presently receiving $198.95 per month under the defendant's retirement pension program; however, if this court determines that the Military Selective Service Act, 50 U.S.C. App. § 459, entitles the plaintiff to receive "accredited service" for his time in the service, plaintiff will be entitled to $216.06 per month; an increase per month of $17.11. If the plaintiff's seniority status is so determined, he will be entitled to an appropriate award to compensate him for the loss of this amount from past pension payments, and to a mandatory injunction requiring the defendant to increase his present pension payment from $198.85 per month to $216.06 per month, as to all future installments on his pension.

The defendant established its pension program for its employees on July 1, 1944, and the plan has been amended from

time to time pursuant to negotiations between the defendant and the various local unions of the International Brotherhood of Electrical Workers since 1950, including Local No. 841 of which the plaintiff was a member at the time of his retirement. The pension plan has been a part of collective bargaining agreements between the defendant and the various local unions of the International Brotherhood of Electrical Workers since July, 1961, including Local No. 841.

The pension plan provides that all full-time regular employees of the defendant who have completed one year of service with the defendant and have attained the age of 25 years are included in the pension plan. Employees other than full-time regular employees, such as part-time employees and emergency employees, are not included in the pension plan and are not eligible to accrue "accredited service." According to directives and practices of the defendant, a full-time regular employee of the defendant is an employee who is employed on a full-time basis for an indefinite period of time. A full-time regular work week of the defendant consists of 40 hours per week, and regular daily work consists of eight scheduled hours work per day. Furthermore, under the defendant's pension plan, in the computing of "accredited time" the pension plan makes immaterial the number of overtime hours or overtime days the employee may have worked during his career, as none of this actual work time is taken into account in computing "accredited service." "Accredited service" does include, pursuant to collective bargaining agreements and employment practices and policies of the defendant, the following:

(1) From two weeks to five weeks annual vacation, the length of such vacation depending upon the length of the employee's service;

(2) Eight holidays per year;

(3) Annual sick leave up to 10 work days per year, or accumulation of a maximum of 30 work days;

(4) Up to three work days as a result of death in the immediate family of an employee; and

(5) Up to a maximum of nine months extended sick leave with pay, or up to 12 months by reducing the pay per month to the equivalent of six months at full pay and six months at half pay. (Such extended sick leave is discretionary with defendant and is pro-rated downward for employees with less than 20 years of service with defendant.)[2]

With respect to the exclusion of military service by the defendant from its pension plan, except as provided by the amendment of January 1, 1966 (which is not applicable to the plaintiff) the defendant has excluded all periods of leave of absence without regular pay and periods of military service in the computation of "accredited service" for the purpose of the pension plan.[3]

2. Each of these inclusions involves time in which no work was performed.

3. Section II. 2. of the defendant's pension plan provides:

2. Persons in Military Service and Employees on Authorized Leave of Absence. Any person not already included in the Plan who leaves or has left the employ of the Company to enter the Armed Forces of the United States or is on authorized leave of absence without regular pay and who returns to the employ within a reasonable time after discharge from such service (which reasonable time shall not in any event be construed to be less than 90 days or such longer period as may be less than 90 days or such longer period as may be fixed by law) or at or before termination of his leave of absence, shall, upon such return, be included in the Plan if and when he has met the requirements of subsection 1 of this Section. *In determining continuity or immediacy of service referred to in such subsection, the period of such absence in the Armed Forces of the United States or on such authorized leave of absence without regular pay shall be deemed not to have existed . . .* (Emphasis added.)

Section III. 2. provides:

2. Crediting of Past Service. Past Service, if any, as defined in Section I, shall be credited to all employees included in the Plan (a) who were so included on July 1, 1944, (b) who were on the payroll on July 1, 1944 and subsequently were included in the Plan without lapse of employment since July 1, 1944, or (c) who were on authorized leave of absence without regular pay or in the Armed Forces on July 1, 1944 and were included in the Plan on or after their return to the employ of the Company as provided in Section II hereof. *Employees designated in (c) above shall not be credited with Past Service for the period of such leave of absence or service in the Armed Forces, except as provided in subsection 3(a) of this Section III.* No other employee included in the Plan shall be entitled to such Past Service. (Emphasis added.)

4. Section III of the plan does not apply to the plaintiff.

The plaintiff's status and benefits under the defendant's pension plan were reviewed with the plaintiff by the defendant on September 11, 1967, at which time the plaintiff was advised by the defendant that it would not include as a part of its computation of pension benefits the period of time he spent in the military service as "accredited service." The method of computation used to determine the plaintiff's retirement benefits is found in Section V.4(a) and (b) of the pension plan. This method is the so-called "minimum Retirement Income" method which takes into account two operating factors: (1) the employee's rate of earnings as of his retirement date; and (2) his years of "accredited service."

The amount of contributions to the pension plan trust fund is determined by the defendant or its agents annually on an actuarial basis, taking into account the factors which include: (1) the number of full-time regular employees who are covered by the plan; (2) their accredited service; and (3) their earnings. Further, the defendant maintains that the pension plan trust fund was not funded to pay retirement income based upon the inclusion of military service as accredited service other than as provided by Section III of the plan.[4]

CONCLUSIONS OF LAW

The legal issue before the court is simply whether 50 U.S.C.App. § 459(b) and (c) require this defendant employer to include the plaintiff's time spent in the military service in its computation of benefits under the defendant's retirement pension plan. More basically, this court must de-

termine whether the retirement benefits under the defendant's pension plan were perquisites of "seniority" or merely in the nature of "other benefits" under Section 9(c)(1) [50 U.S.C.App. § 459(c)(1)] of the act.[5] If the rights of the plaintiff, under the defendant's pension plan, are seniority rights, it is clear that the time he spent in the service of his country must be included in the computation of the amount of his pension payments. 50 U.S.C.App. § 459(b) and (c);[6] Accardi v. Pennsylvania R. Co., 383 U.S. 225, 86 S.Ct. 768, 15 L.Ed.2d 717 (1966).

The defendant, Alabama Power, contends that its pension plan is not a seniority benefit but rather a retirement program based on the amount of *work actually performed* for the company, and thus is an "other benefit" which is not subject to the Military Selective Service Act. The finding of this court thus rests upon whether or not this pension plan is based upon the actual amount of work performed for the defendant company, or whether this pension plan is simply a perquisite of "seniority."

5. If the retirement pension is to be considered as "other benefits," the stipulated facts in this case would mandate a holding for the defendant under § 459(c)(1), because that section allows the returning veteran "insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, . . ." The rules of the defendant company have at all material times denied rights in "insurance or other benefits," as distinguished from seniority rights to employees on furlough or leave of absence.

6. This is so because § 459(b) requires that upon return from military service the veteran must "be restored by such employer or his successor in interest to such position or to a position of like seniority, status, and pay; . . ." If the amount of this veteran's retirement pension is a matter of seniority, he could only be restored to "like seniority" if the years in service were included in the computation. This is especially true when the language of § 459(c) is considered, as follows: ". . . be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment."

SENIORITY RIGHTS

[1] This court takes note that because the act does not define the term "seniority," veterans have had to turn to the courts for a definition of seniority rights.[7] The courts have had to proceed, case by case, to delineate the concept of "seniority" within the spirit of the act, without a rigid classification of seniority rights by collective bargaining agreements or employer interpretation of what seniority rights should or should not consist of.

While collective bargaining contracts have been consulted by the Supreme Court, the rule devised by the Supreme Court in interpreting individual contracts once a benefit has been determined to be a perquisite of seniority has always been:

> This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need . . . And no practice of employers or agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act. Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275 at 285, 66 S.Ct. 1105 at 1111, 90 L.Ed. 1230 (1946).

The problem of the definition of "seniority" was addressed again by the Supreme Court in Accardi v. Pennsylvania R. Co.:

> The term "seniority" is nowhere defined in the Act . . . [it] . . . is not to be limited by a narrow, technical definition but must be given a meaning that is consonant with the intention of Congress as expressed in the 1940 act. That intention was to preserve for the returning

7. Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 66 S.Ct. 1105, 90 L.Ed. 1230 (1946): Oakley v. Louisville & N. R. Co., 338 U.S. 278, 70 S.Ct. 119, 94 L.Ed. 87 (1949); Diehl v. Lehigh Valley R. Co., 348 U.S. 960, 75 S.Ct. 521, 99 L.Ed. 749 (1955); Tilton v. Missouri P. R. Co., 376 U.S. 169. 84 S.Ct. 595. 11 L.Ed.2d 590 (1964); Accardi v. Pennsylvania R. Co., 383 U.S. 225, 86 S.Ct. 768. 15 L.Ed.2d 717 (1966).

> veterans the *rights and benefits* which would have automatically accrued to them had they remained in private employment rather than responding to the call of their country. 383 U.S. at 229, 230, 86 S.Ct. at 771. (Emphasis added.)

The defendant's pension plan makes immaterial the number of overtime hours, days, weeks, months or years which the employee may have worked during his career. None of this actual work time is taken into account in computing "accredited service."

After a thorough review of defendant's pension program, this court is of the considered opinion that this plaintiff was not treated as though he had been continuously employed. No provision has been made in the pension plan for computation of pension benefits based upon "units of work." In fact, the agreed facts show that the total time of employment is what is material in the computation, and not the actual amount of work performed during said total time of employment.

There can be no question that the computation is essentially based upon seniority, since it is based entirely upon time, and not at all upon the amount of work actually performed for the company. Time is the essence of seniority and that is what seniority computation is all about.

[2] The intention of Congress was to recognize the existence of seniority systems and seniority rights, and Congress sought to preserve the veteran's rights under those systems and to protect him against loss of seniority benefits by reason of his absence. In *Fishgold*, the Supreme Court observed:

> Thus he does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war. 328 U.S. at 284-285, 66 S.Ct. at 1111.

This "escalator" principle[8] was reaffirmed by the Supreme Court in Trailmobile Co. v. Whirls, 331 U.S. 40, 67 S.Ct. 982, 91 L.Ed. 1328 (1947); and restated in Oakley v. Louisville & N. R. Co., 338 U.S. 278 at 283, 70 S.Ct. 119 at 122, 94 L.Ed. 87 (1949).

> [A]n honorably discharged veteran, covered by the statute, [is] entitled by the Act to be restored not to a position which would be the precise equivalent of that which he had left when he joined the Armed Forces, but rather to a position which, on the moving escalator of terms and conditions affecting that particular employment, would be comparable to the position which he would have held if he had remained continuously in his civilian employment.

There can simply be no doubt that the plaintiff in this case could not be said to have been moved back to his proper place on the "escalator" as to his retirement rights and benefits if his time in the military service were not included in the computation of his retirement pension. Otherwise this plaintiff would lose ground by reason of his absence.

The Supreme Court has warned that "seniority" is not an inflexible concept:

> In providing that a veteran shall be restored to the position he had before entering the military service "without loss of seniority," § 8 of the Act [50 U.S.C.A. App. § 459] uses the term "seniority" without definition. It is thus apparent that Congress was not creating a system of seniority but recognizing its operation as part of the process of collective bargaining. We must therefore look to the conventional uses of the seniority system in the

8. The "escalator" principle has been incorporated into the Act as subsection 9(c)(2) [50 U.S.C.App. § 459(c)(2)]

> It is declared to be the sense of Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) [of this section] should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.

process of collective bargaining in order to determine the rights of seniority which the Selective Service Act guaranteed the veteran. Aeronautical Industrial District Lodge 727 v. Campbell, 337 U.S. 521, 526, 69 S.Ct. 1287 at 1290, 93 L.Ed. 1513 at 1518 (1949).

This court is of the considered opinion that great emphasis is to be placed upon the "real nature" of the pension benefits in the case at bar, and it concludes that the purpose of this retirement benefit is to promote personnel stability by giving employees an incentive to remain with the company. Seniority is not an abstract right or position. Rather, seniority is a measurement by which other rights are determined; advancement, promotion, higher pay, vacations and vacation pay, layoffs, supplemental employment benefits, severance pay, and in the present case, retirement and pension benefits. The employee should be able to rely on receiving pension benefits based upon seniority, including the time spent in the military forces. Such a reliance right does not favor this veteran plaintiff over the nonveteran or grant him any super-seniority. *Fishgold, supra.* Rather, the right of the veteran to have his military time computed as accredited service guarantees equal competitive status with those employees who did not respond to the call of their country.

This court is led to the inescapable conclusion that, as was stated by our Supreme Court in *Accardi*:

> The requirements of the . . . Act are not satisfied by giving returning veterans seniority in some general abstract sense and then denying them the perquisites and benefits that flow from it. We think it clear that the amount of these [separation] allowances is just as much a perquisite of seniority as the more traditional benefits such as work preference and order of lay-off and recall. 383 U.S. at 230, 86 S.Ct. at 772.

[3] The statutory purpose of the act must be borne in mind at all times so that an employer is not permitted by contract, contrivance or otherwise to remove a large segment of his employees from the scope of the act and thus evade

this basic policy. Dame v. C. A. Batson Co., 157 F.Supp. 862 (D.C.Mass.1957). For this court to deny accredited service to this plaintiff under these circumstances for the time in which he was in the service of his country would be rejection of the holding of still another Supreme Court case, Eagar v. Magma Copper Co., 389 U.S. 323, 88 S.Ct. 503, 19 L.Ed.2d 557 (1967), stating the basic principle that "* * * he who is 'called to the colors is not to be penalized on his return by reason of his absence from his civilian job.' "[9]

> In these times of relatively high wages and steep income taxes, unions bargain vigorously for indirect compensation in the form of a host of diverse benefits. Whether the benefits are elements of "seniority" or "other benefits," the veteran's stake in them must be protected if they would automatically accrue to him but for induction. Clearly, the exclusion of veterans from benefits that have come to be regarded as essential perquisites of employment is inconsistent with the Universal Military Training and Service Act. Hollman v. Pratt & Whitney Aircraft, 435 F.2d 983 at 989 (5th Cir. 1970).

[4] The Secretary of Labor is charged with the administration of the veterans' reemployment rights statutes and published in 1970 the "Veterans' Reemployment Rights Handbook." As indicated in the preface thereto, the Secretary does not have authority to issue binding administrative rulings, but the courts have generally given the Secretary's published interpretations at least "careful consideration and in proper circumstances . . . considerable weight."[10]

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9. Hollman v. Pratt & Whitney Aircraft, 435 F.2d 983 at 988 (5th Cir. 1970); Tilton v. Missouri Pacific Railroad Co., 376 U.S. 169, 170-171, 84 S.Ct. 595, 597, 11 L.Ed.2d 590 (1964): Fishgold v. Sullivan Corp., 328 U.S. 275, 284, 66 S.Ct. 1105, 1111, 90 L.Ed. 1230 (1946).

10. Wirtz v. Keystone Readers Service, Inc., 418 F.2d 249 at 257 (5th Cir. 1969). See, also, Skidmore v. Swift & Co., 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944); and Helton v. Mercury Freight Lines, Inc., 444 F.2d 365 at 368, footnote 4 (5th Cir. 1971), i. e., ". . . the Handbook has . . . a measure of weight."

Chapter XV of the "Veterans' Reemployment Rights Handbook" includes the following pertinent comments at page 91:

> . . . there are numerous . . . benefits which form a part of the veteran's total employment status or "position" and thus come within the purview of the reemployment statute at and after the time he applies for reinstatement. Among these other features of the employment may be such benefits as holiday pay, sick pay, insurance of various types, bonuses, profit sharing plans, *pension or retirement plans*, and severance pay. The reemployment statute does not independently create such benefits for the veteran, but where they have been established by contract, policy, or practice, the statute does affect the manner in which the established rules are applied to him. (Emphasis added.)
>
> * * * * * *
>
> With respect to benefits maturing and enjoyable only during the period of his military absence, the veteran is to be treated like an employee who has been on a non-military furlough or leave of absence. With respect to benefits maturing or enjoyable after his reinstatement, he is to be treated as if he had remained continuously employed rather than absent in military service.

The "Veterans' Reemployment Rights Handbook" further provides on page 97:

> As far as reemployed veterans are concerned, some common threads do run through all retirement problems. Continuity of service with the employer or in the industry is the essence, though perhaps not the entirety, of what a retirement plan is designed to reward, and the reinstated veteran's military service time must of course be counted toward his continuous service with his employer. *In nearly all cases, the retirement annuity or pension is a right or benefit maturing after reinstatement, and as such, is subject to the requirement that the veteran be treated not as if he had been on leave of absence but as if he had remained continuously employed rather than absent for military service*, except where it is shown that credits under the pension plan

> are, in fact, precise additional pay for units of work done. (Emphasis added.)

[5] This court is of the considered opinion that, as has previously been pointed out, there is no evidence in this case to show that the pension plan is based upon any "unit of work" requirement. Hence this court is led to the inescapable conclusion that Sections 459(b) and (c) mandate that the defendant, Alabama Power Company, recompute the plaintiff's accredited service by including the time the plaintiff spent in the service of his country.

THE "OTHER BENEFIT"[11] PROVISION OF THE MILITARY SELECTIVE SERVICE ACT

[6, 7] The defendant, Alabama Power, asks this court to classify the retirement pension benefits under its plan as "other benefits" and therefore to rule that the case is governed by defendant's established rule and practice relating to employees on furlough or leave of absence. This practice has been to treat those employees in military service as if on furlough or leave of absence and therefore to exclude military time in computing "accredited service." However, this path was barricaded by the Supreme Court in *Accardi, supra*, wherein the court stated:

> Without attempting in this case to determine the exact scope of this provision of § 8(c) it is enough to say that we consider that it was intended to add certain protec-

11. 50 U.S.C.App. § 459(c) provides in pertinent parts as follows:
Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) [of this section] shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without loss of seniority, *shall be entitled to participate in insurance or other benefits* offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration. (Emphasis added.)

> tions to the veteran not to take away those which are granted him by § 8(b)(B) and the other clauses of § 8(c). 383 U.S. at 232, 86 S.Ct. at 773.

Under this reasoning, the "other benefits" clause must be viewed as a separate addition to the seniority provisions of the act, and it cannot be used as a basis for defining and limiting the perquisites of seniority. While the problem of construction is difficult, it seems most likely that the expression "insurance or other benefits" was meant to cover a fairly narrow group of economic advantages whose common quality was that they were miscellaneous fringe benefits not usually regarded as part of "pay," "status," or "seniority." The "other benefits" clause was added to the act for the express purpose of entitling employees to receive while in the service such benefits as their employers accorded employees on leave or furlough. *Accardi, supra*, 383 U.S. at 231, 86 S.Ct. 768.

THE "GRATUITY" ARGUMENT

[8] The defendant has argued that no law requires it to provide a pension plan for its employees and that the providing of same is a mere gratuity on its part and not an enforceable contract, essentially since the plan, as one of its provisions, specifically states as follows:

IX. LIMITATION OF RIGHTS OF THE EMPLOYEE

> This Plan shall not be deemed to constitute a contract between the Company and any employee or to be a consideration for, or a condition of, the employment of any employee.

It is sufficient answer to this contention to say that it has been a part of the collective bargaining agreement which covered this plaintiff since 1961, regardless of this internal disclaimer. This contention was set at rest in Ball v. Victor

Adding Machine Company, 236 F.2d 170 at 173, 174 (5th Cir. 1956), by cogent reasoning as follows:

> And the idea that a Pension Trust expressly approved, as was this one, by the Internal Revenue Service as a plan qualified under Section 165, 1939 Code, 26 U.S.C.A. § 165; 1954 Code, § 401, 26 U.S.C.A. §§ 401, 402, is a mere gratuity or charitable enterprise beyond even the barest scrutiny by its sole beneficiaries (the employees) is completely out of keeping with the philosophy and purpose of such plans as the means of paying *additional* compensation to the covered employees in a way to afford substantial and immediate tax advantages to the Employer and substantial tax and monetary benefits to the employees. See, Law of Federal Income Taxation, Mertens, 1942, Vol. 4, § 25.69, page 440, §§ 25.70 to 25.76, incl., and full historical background, 1954 Pocket Supplement, §§ 25.70 to 25.75. A pension trust is no will of the wisp for "* * * within the meaning of section 165(a) [it] is a plan established and maintained by an employer primarily to provide systematically for the payment of definitely determinable benefits to his employees over a period of years, usually for life, after retirement * * *." Federal Tax Regulations, § 39.165-1(a)(2). And see, §§ 39.165-1(a)(3), 39.165-4(e). So much so is it for the employees that the statute, Sec. 165(a), requires that the Pension Trust be "for the exclusive benefit of [the] employees" with distribution of corpus and income of such trust limited to "such employees or their beneficiaries" with an absolute prohibition against use or diversion of any such funds to "purposes other than for the exclusive benefit of [the] employees or their beneficiaries". It must be nondiscriminatory as to employees, Regulations, §§ 39.165-1(a), 39.165-4, and forbid diversions, § 39.165-2; and the Employer's contributions are in no sense a gift for they are deductible, "* * * only to the extent that they are ordinary and necessary expenses * * * in carrying on [the] trade or business and are compensation for personal services actually rendered * * *" and together with all other compensation paid to the employee constitutes "a reasonable allowance for compensation for the services actually rendered * * *", Regulations, § 39.23(p)-1-(b), see, e. g., Farnsworth & Co. v. Commissioner, 5 Cir., 203 F.2d 490. "It

> surely cannot be seriously disputed but that such [a pension agreement] on the part of the company forms a part of the consideration for work performed * * *. In this view, the pension thus promised would appear to be as much a part of his 'wages' as the money paid him at the time of the rendition of his services." Inland Steel Co. v. N.L.R.B., 7 Cir., 170 F.2d 247, 253, 12 A.L.R.2d 240, certiorari denied 336 U.S. 960, 69 S.Ct. 887, 93 L.Ed. 1112.

There can therefore be no question that the claim here is contractual in nature and that the pension plan was part of a binding contract. Hence, this court concludes there is no merit in the defendant's assertion that its pension plan is a mere gratuity and not a perquisite of seniority.

THE CONSTITUTIONAL ARGUMENT

[9] This court is not persuaded by the argument of defendant that its constitutional rights would be impaired if it were ordered to increase the pension benefits to be paid to this plaintiff. The Supreme Court of the United States has construed the statute here in question too many times, without declaring it unconstitutional, for this court to be persuaded by such an argument. Fishgold v. Sullivan Drydock & Repair Corp. et al., 328 U.S. 275, 66 S.Ct. 1105, 90 L.Ed. 1230 (1946); Tilton et al. v. Missouri Pacific Railroad Co., 376 U.S. 169, 84 S.Ct. 595, 11 L.Ed.2d 590 (1964); Accardi et al. v. Pennsylvania Railroad Co., 383 U.S. 225, 86 S.Ct. 768, 15 L.Ed.2d 717 (1966); Eagar et al. v. Magma Copper Co., 389 U.S. 323, 88 S.Ct. 503, 19 L.Ed.2d 557 (1967).

[10] Furthermore, the statute in essence prescribes conditions of employment which an employer must accept if he retains the returned veteran more than one year after he has returned from military service, since § 459(c)(1) does not require the employer to retain the veteran in his employ for more than one year. Obviously, if the employer does retain the veteran beyond that one year, he retains that veteran with the mandate of the statute included as an im-

plied provision in such contract of employment as exists between the veteran and his employer. Defendant's retention of plaintiff for more than the one year mandated by the statute waived any impairment of defendant's constitutional rights.

STATUTES OF LIMITATIONS AND THE DOCTRINE OF LACHES

The defendant maintains that the plaintiff is barred from relief because of the Alabama statutes of limitations or because of the equitable doctrine of laches. The dates involved in this suit are not in dispute; it is established that the plaintiff commenced his employment on August 16, 1937, temporarily left the defendant's employment on March 18, 1943, and honorably served his country until October 1, 1945. On October 8, 1945, the plaintiff was reinstated with defendant and continued that employment until he retired on June 1, 1971. The plaintiff's status under the defendant's pension program was reviewed with the plaintiff by the defendant on September 11, 1967, at which time the plaintiff was advised by the defendant that defendant's pension plan did not afford accredited service for the time the plaintiff was in the military service. The plaintiff contacted the appropriate officer of the United States Department of Labor on July 6, 1971, to assist him in pursuing this claim and to request that suit be brought by the U. S. Attorney. Suit was filed by the U. S. Attorney on behalf of the plaintiff on December 20, 1972.

[11, 12] There is no federal statute of limitations applicable to actions brought under 50 U.S.C.A. App. §459. Thus this court must rely upon the statutes of limitations found in Alabama law.[12] To determine which Alabama statute of

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12. O'Sullivan v. Felix, 233 U.S. 318, 322, 34 S.Ct. 596, 598, 58 L.Ed. 980 (1914); Balkam v. Woodstock Iron Co., 154 U.S. 177, 187-188, 14 S.Ct. 1010, 1014, 38 L.Ed. 953 (1894); Moviecolor, Ltd. v. Eastman Kodak Co., 2 Cir. 1961, 288 F.2d 80, 90 A. L.R.2d 252,

limitations is applicable to a Section 459 right, this court must first determine under federal law the nature of the right and then decide which statute of limitation Alabama would have enforced if the action seeking similar relief had been brought in the state court.[13] Deciding which statutory period is appropriate is a two-step process. First, with reference to federal law, this court must determine the "essential nature" of the claim. Then this court must refer to the Alabama courts' interpretation of its statute of limitation to ascertain which period would be applicable to a claim similar to the one before this court. Bell v. Aerodex, Inc., 473 F.2d 869 at 871 (5th Cir. 1973).

The defendant places principal reliance on two recent Fifth Circuit opinions, Bell v. Aerodex, Inc., *supra*, and Blair v. Page Aircraft Maintenance, Inc., 467 F.2d 815 (5th Cir. 1972), where the Fifth Circuit, in passing on *claims for back wages only* under the 1967 act, held that such claims were actions at law and that the court was bound to apply the applicable statutes of limitations of Florida and Alabama. But the defendant's reliance on *Blair* and *Bell* is misplaced. In both of these cases, the Fifth Circuit was careful to note that the claims in question, being only for back wages, should be denominated as "wage cases" and suggested a different result might follow if the wage claims were coupled with claims for the restoration of a veteran's rights.

[13] This court, after a careful review of the pleadings in this case, is of the considered opinion that this is not a suit by the plaintiff for back wages. Rather, the plaintiff primarily seeks an injunctive order, in the nature of the equitable remedy of specific performance, requiring the defendant to include his military service time in computing his

cert. den. 368 U.S. 821, 82 S.Ct. 39, 7 L.Ed.2d 26; Blair v. Page Aircraft Maintenance, Inc., 467 F.2d 815 at 818 (5th Cir. 1972).

13. Sewell v. Grand Lodge of International Association of Machinists and Aerospace Workers, 5 Cir. 1971, 445 F.2d 545, 549, cert. den. 404 U.S. 1024, 92 S.Ct. 674, 30 L.Ed.2d 674 (1972); Beard v. Stephens, 5 Cir., 1967, 372 F.2d 685, 688.

monthly or yearly pension or retirement benefits—back installments *and future installments.* It is true that ultimately the plaintiff will receive an increased amount of money—a precise amount of $17.11 per month at present, and perhaps a different amount if the plan is later changed. However, this court takes judicial notice that all perquisites of seniority will result in some payment of money, i.e., a higher place on the seniority list generally results in a veteran receiving higher wages, longer vacations, etc. As has been previously pointed out, seniority is not an abstract right or position. Rather, seniority is a measurement by which other rights are determined; advancement, promotion, higher pay, vacations and vacation pay, layoffs, supplemental employment benefits, severance pay, and in the present case, retirement and pension benefits. All of these seniority benefits result in the veteran receiving more money than if his military service time were not included in the computation of any of these benefits. Hence, this court concludes that because this is not a strictly "back wage case" suit, the one-year Alabama statute of limitations is not applicable to this action.[14]

The collective bargaining agreement covering the plaintiff at the time of his retirement did include the pension plan as a matter of contract and hence the pension plan was part of his contract of employment. Moreover, the plaintiff in this case has expressly brought a "suit for the restoration of veteran's rights," which this court deems to be an equitable action to restore this veteran plaintiff to the status and seniority he would have obtained had he not responded to the call of his country. Hence, because this case is not a "back wage case" but rather is in the nature of a "suit for the restoration of veteran's rights," this court is of the considered opinion that if any statute of limitations is applicable,

14. Code of Alabama, tit. 7, § 26. Limitation of one year.
The following must be commenced within one year:
* * * * *
Actions for any injury to the person or rights of another, not arising from contract, and not herein specifically enumerated.

it would appear to be the six-year statute of limitations which applies to claims arising out of contracts.[15]

The defendant, Alabama Power, contended in its brief that if the six-year statute of limitations is applied by this court, the plaintiff must still be denied relief for his failure to commence any action within six years from the time he could have successfully maintained a suit based upon that cause of action. Alabama Power asserts that the plaintiff's cause of action arose upon his return to work for Alabama Power on October 8, 1945. This court is of the opinion that this contention by the defendant contains no merit.

[14, 15] In the case of a pension plan, the beneficiary generally has no right of action until his rights have vested by the confluence of the stipulated time with the continued adherence to the conditions of the plan. A failure to assert it before it becomes vested does not start the statute running. Barninger v. National Maritime Union, 372 F.Supp. 908 at 913 (S.D.N.Y.1974). Moreover, the defendant's pension plan, in Section IX, entitled "Limitation of Rights of the Employee," contains the following sentence:

> Inclusion under the Plan will not give any employee any right or claim to a Retirement Income except upon reaching Normal Retirement Date or Early Retirement Date and no employee or Provisional Payee shall be entitled to any right or claim to a Retirement Income except to the extent such right is specifically fixed under the terms of the Plan and there are funds available therefor in the hands of the Trustee.

The court is of the opinion that no claim for relief arose before the plaintiff's retirement date. It is possible that an

15. Code of Alabama, tit. 7, § 21. Limitation of six years.
The following must be commenced within six years:
* * * * *
Actions founded on promises in writing not under seal.
* * * * *
Actions upon any simple contract or specialty, not herein specifically enumerated.

anticipatory breach occurred in 1967 when the defendant informed the plaintiff that he would not get credit in seniority computation under the pension plan for the time spent in military service. However, the law is settled that the plaintiff has the election to bring his claim for anticipatory breach at the time it occurs or he may elect to wait until time for performance.[16] Plaintiff did not elect to declare an anticipatory breach in 1967; therefore, the statute of limitations did not begin to run prior to his retirement in 1971.

[16] If the court is in error in holding that the six-year statute applies, nevertheless the one-year statute would be only a partial bar. Basic hornbook law establishes that where a debt or obligation is payable in installments, the statute of limitations begins to run as to each installment from the time it falls due. Maynor v. Dillin, 241 Ala. 362, 2 So.2d 440 (1941); Hodgson v. Behrens Drug Co., 475 F.2d 1041 at 1050 (5th Cir. 1973); Tye v. Hertz Drivurself Stations, 80 F.Supp. 536 (E.D.Pa.1948), appeal dismissed.

[17] Finally, Alabama Power asserts that if this court determines that the plaintiff's claim for relief constitutes an equitable cause of action, then the claim of plaintiff should be denied because of the plaintiff's inexcusable delay of 35 years in prosecuting his claim to the detriment of Alabama Power. However, this court cannot agree that the doctrine of laches forecloses relief for this retired veteran. The doctrine of laches is an equitable doctrine based on public policy which requires the discouragement of stale demands. Laches is not based upon a mere lapse of time, but is principally a question of the inequity of permitting a claim to be enforced where some change in condition has taken place which would make enforcement of the claim unjust. Muscianese v. United States Steel Corporation, 354 F.Supp. 1394 at 1398 (E.D.Pa.1973).

[18, 19] Laches consists of two basic elements, inexcusable delay in instituting suit and prejudice resulting to the respondent from such delay. Sobosle v. United States Steel

16. Saliba v. Brackin, 260 Ala. 103, 69 So.2d 267 (1954).

Corporation, 359 F.2d 7 at 12 (3rd Cir. 1966). The question of delay, as well as the issue of laches itself, is addressed to the sound discretion of the trial court. Burnett v. New York Central Railroad Company, 380 U.S. 424, 85 S.Ct. 1050, 13 L.Ed.2d 941 (1965). On July 6, 1971, the plaintiff contacted an appropriate officer of the United States Department of Labor to assist him in pursuing his claim. This court finds that the plaintiff was very diligent in pursuing his rights under the defendant's pension program, as the plaintiff contacted the Department of Labor five days after his retirement. Suit was then filed by the U. S. Attorney on behalf of the plaintiff on December 20, 1972. Plaintiff had no obligation to act more quickly. The pension plan itself stated he had no rights thereunder until reaching retirement age. He had the right to rely upon this language. Any delay on his part was clearly excusable.

This court finds no merit in the contention of Alabama Power that it suffered substantial prejudice because the plaintiff delayed his assertion of his rights under the pension program. Furthermore, the court is especially unpersuaded by the argument that defendant will have been prejudiced if the court rules in plaintiff's favor, because defendant will have, by its failure to correctly compute the seniority of its retiring employees, insufficiently funded its pension plan. This court is of the considered opinion that this defendant has had the interest-free use of a certain sum of money, the amount of which is not ascertainable by the evidence, for a number of years, which it otherwise would not have had the use of because it would have been paid into the trust fund. The defendant cannot be heard to complain of the free use, without interest, of this sum of money, whether it be large or small. Hence this court cannot agree with the defendant that the doctrine of laches bars this retired World War II veteran from the seniority rights and benefits which would have automatically accrued to him had he remained in private employment rather than responding to the call of his country.

Accordingly, this court finds that the plaintiff is entitled to have the two-year, six-month and 20-day period he spent in the service of his country computed as "accredited service" under the defendant's retirement pension plan. The plaintiff is thereby entitled to an increase in his retirement pension benefits of $17.11 per month. Additionally, the plaintiff is entitled to an appropriate award to compensate him for loss of this amount in past pension payments, and to a mandatory injunction requiring the defendant to increase the plaintiff's present pension payments from $198.95 per month to $216.06 per month, as to all future installments of his pension. Plaintiff will submit an appropriate order to the court for signature within 30 days.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

RAYMOND E. DAVIS, Plaintiff	)	
vs.	)	CIVIL ACTION
ALABAMA POWER COMPANY,	)	NO. 73-G-1123
Defendant	)	

ORDER

The above-styled cause having come on for trial before the Court and consideration having been given to the pleadings, the stipulations and briefs of the parties, and the evidence received at the trial, and the Court having made its Findings of Fact and Conclusions of Law as set forth in the Memorandum Opinion entered on September 11, 1974, and for good cause shown:

It is ORDERED, ADJUDGED and DECREED that the defendant, its officers, agents, servants, employees and those persons in active concert with it, be and they hereby are,

permanently enjoined and restrained from violating the provisions of the Military Selective Service Act (formerly the Universal Military Training and Service Act), 50 U.S.C. App. 459, with respect to the rights of plaintiff, Raymond E. Davis, and his heirs and assigns in any respect and specifically in any of the following respects:

1. The defendant shall not, contrary to the aforesaid Act, exclude or cause the exclusion of any of the plaintiff's period of absence due to military service from approximately March 18, 1943 to October 8, 1945, for the purpose of determining the plaintiff's years of "Accredited Service" under The Pension Plan of Alabama Power Company.

2. The defendant shall immediately (beginning with the first payment due after September 1, 1974) increase the amount of plaintiff's monthly pension payments from $108.95 to $216.06 and afford him all the benefits and entitlements provided by any future changes in the plan.

3. The defendant shall not continue to withhold from plaintiff his past pension underpayments in the amount of $684.40 (computed thru September 1, 1974) together with interest thereon in the amount of $66.73 (computed through October 1, 1974).

It is further ORDERED that costs be taxed against the defendant, for which let execution issue.

DONE, this the 1st day of October, 1974.

/s/ J. FOY GUIN, JR.

J. FOY GUIN, JR.
United States District Judge

APPENDIX C

Military Selective Service Act, 62 Stat. 614, *as amended*
50 U.S.C. App. § 459 (b) & (c)

§ 459. Separation from service

(b) Reemployment rights

In the case of any such person who, in order to perform such training and service, has left or leaves a position (other than a temporary position) in the employ of any employer and who (1) receives such certificate, and (2) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

(A) if such position was in the employ of the United States Government, its Territories, or possessions, or political subdivisions thereof, or the District of Columbia, such person shall—

(i) if still qualified to perform the duties of such position, be restored to such position or to a position of like seniority, status, and pay; or

(ii) if not qualified to perform the duties of such position by reason of disability sustained during such service but qualified to perform the duties of any other position in the employ of the employer, be restored to such other position the duties of which he is qualified to perform as will provide him like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in his case;

(B) if such position was in the employ of a private employer, such person shall—

(i) if still qualified to perform the duties of such position, be restored by such employer or his successor in interest to such position or to a position of like seniority, status, and pay; or

(ii) if not qualified to perform the duties of such position by reason of disability sustained during such service but qualified to perform the duties of any other position in the employ of such employer or his successor in interest, be restored by such employer or his successor in interest to such other position the duties of which he is qualified to perform as will provide him like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in his case,

unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

(C) if such position was in the employ of any State or political subdivision thereof, it is declared to be the sense of the Congress that such person should—

(i) if still qualified to perform the duties of such position, be restored to such position or to a position of like seniority, status, and pay; or

(ii) if not qualified to perform the duties of such position by reason of disability sustained during such service but qualified to perform the duties of any other position in the employ of the employer, be restored to such other position the duties of which he is qualified to perform as will provide him like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in his case.

(c) Service considered as furlough or leave of absence

(1) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) [of this section] shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time

such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

(2) It is declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) [of this section] should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.

(3) Any person who holds a position described in paragraph (A) or (B) of subsection (b) [of this section] shall not be denied retention in employment or any promotion or other incident or advantage of employment because of any obligation as a member of a reserve component of the Armed Forces of the United States.

1940 Code of Alabama (Recomp. 1958), Title 7, § 21

The following must be commenced within six years:

Actions for any trespass to person or liberty, such as false imprisonment, or assault and battery.

Actions for any trespass to real or personal property.

Actions for the detention or conversion of personal property.

Actions founded on promises in writing not under seal.

Actions for the recovery of money upon a loan, upon a stated or liquidated account, or for arrears of rent due upon a parol demise.

Actions for the use and occupation of land.

Motions and other actions against the sureties of any sheriff, coroner, constable, or any public officer, or actions against the sureties of executors, administrators, or guardians, for any nonfeasance, misfeasance, or malfeasance,

whatsoever, of their principal; the time to be computed from the act done or omitted by their principal, which fixes the liability of the surety.

Motions and other actions against attorneys at law, for failure to pay over money of their clients, or for neglect or omission of duty.

Actions founded upon judgments obtained before justices of the peace of this state.

Actions upon any simple contract or specialty, not herein specifically enumerated.

1940 Code of Alabama (Recomp. 1958), Title 7, § 26

§ 26. Limitation of one year.

The following must be commenced within one year:

Actions for malicious prosecution.

Actions for seduction.

Actions qui tam, or for a penalty given by statute to the party aggrieved, unless the statute imposing it prescribes a different limitation.

Actions of libel or slander.

Actions for any injury to the person or rights of another, not arising from contract, and not herein specifically enumerated.

APPENDIX D

Pension Plan For Employees of Alabama Power Company, as amended to and including Amendment of January 1, 1971.

PENSION PLAN
of
ALABAMA POWER COMPANY

INTRODUCTORY STATEMENT

The Pension Plan of Alabama Power Company which became effective on July 1, 1944, and was amended December 5, 1945, July 15, 1946 and September 20, 1948, was one of several similar plans which were adopted by The Commonwealth & Southern Corporation (Delaware) and its subsidiaries while Alabama Power Company was a part of that system before its divestment on September 30, 1949.

As of January 1, 1951, as of January 1, 1956, as of January 1, 1961, and as of January 1, 1966 the Company made certain changes in the Plan. As of January 1, 1971 the Company has made certain further changes which are contained in the Plan which follows.

SECTION I. DEFINITIONS

The following words and phraseology as used herein shall have the following meanings unless a different meaning is plainly required by the context:

"Plan"	The Pension Plan of Alabama Power Company as described in this instrument.
"Effective Date of the Plan"	July 1, 1944.
"Company"	Alabama Power Company and any successor or successors thereof and any wholly owned subsidiary thereof which the Board of Directors of said Company may from time to

time, and upon such terms and conditions as may be fixed by said Board of Directors, determine to bring under the Plan.

"Board of Directors" The board of directors of Alabama Power Company.

"Employee" Each person employed by the Company except that any person who is a member of the United Mine Workers of America, at the date of his employment, or on October 1, 1948 or thereafter becomes a member of said Union or any other mine workers union having a retirement or similar fund, shall on the date of his employment or on October 1, 1948 or the date of his becoming a member, whichever is later, be deemed for the purposes of the Plan to have terminated his employment with the Company on such date; provided, that any such person shall again become an employee as herein defined upon termination of his membership in such Union subject to inclusion in the Plan as a new employee if and when he meets the requirements of the Plan.

"Retirement Board" The managing board of the Plan provided for in Section XI.

"Trust Fund" The fund to be established under a Trust Agreement by contributions made by the Company and from which the amounts of Retirement Income are to be paid.

"Trust Agreement" The agreement providing for the Trust Fund.

"Trustee" The Trustee under the Trust Agreement providing for the Trust Fund.

"Accredited Service" With respect to any employee, the period of his "Future Service" as defined below, together with the period of his "Past Service" as defined below, if any.

"Future Service" The period of service of an employee with the Company after July 1, 1944 and subsequent to the date of his inclusion in the Plan.

"Past Service" The period of service prior to July 1, 1944, whether or not continuous, of an employee with Alabama Power Company and predecessor companies (including service with companies or properties now affiliated or associated with the Company, and service with companies or properties heretofore affiliated or associated prior to the date of severance of such affiliation or association), and if a man after his 30th, and if a woman after her 25th birthday, provided that, for the purpose of payments on and after January 1, 1951, subject to the provisions of Section VII hereof, such period of service prior to July 1, 1944 shall, if resulting in an earlier date of commencement, commence on the date on which the employee first completed one year of such service and attained the age of 25.

"Retirement Income" The monthly retirement income provided for by the Plan.

"Future Service Retirement Income" That part of an employee's Retirement Income computed on the basis of his Future Service pursuant to subsection 2 of Section V.

"Past Service Retirement Income" That part of an employee's Retirement Income computed on the basis of his Past Service pursuant to subsection 3 of Section V.

"Accrued Retirement Income" With respect to any employee at any particular date, the Retirement Income beginning at Normal Retirement Date which would be

payable to such employee at the rates provided in subsections 2 and 3 of Section V, on the basis of his Accredited Service rendered to the date of the computation, limited, however, by the provisions with respect to transfer in subsection 5 of Section III. For possible increase in Accrued Retirement Income for service rendered prior to January 1, 1956, see subsection 10 of Section V. For possible increase in Accrued Retirement Income for service rendered prior to January 1, 1961, see subsection 11 of Section V. For possible increase in Accrued Retirement Income for service rendered prior to January 1, 1966, see subsection 12 of Section V. For possible increase in Accrued Retirement Income for service rendered prior to January 1, 1971, see subsection 13 of Section V.

"Accrued Future Service Retirement Income" — An employee's Accrued Retirement Income as above defined but computed solely upon the basis of his Future Service rendered to the date of computation.

"Accrued Past Service Retirement Income" — An employee's Accrued Retirement Income as above defined but computed solely upon the basis of his Past Service.

"Normal Retirement Date" — The first day of the month following an employee's 65th birthday.

"Early Retirement Date" — The first day of the month following the retirement of an employee on or after his 55th birthday and before his 65th birthday.

"Deferred Retirement Date" — The first day of the month after a retirement subsequent to the Normal Retirement Date.

"Provisional Payee" — A spouse designated by an employee pursuant to Section VI to receive Retirement Income on the death of the employee.

The masculine pronoun wherever used herein shall mean or include the feminine pronoun where applicable.

Wherever reference is made in the Plan to companies "now affiliated or associated" it shall mean the companies formerly in the Commonwealth & Southern system which adopted similar plans, including The Southern Company and Southern Services, Inc. It shall also include Southern Electric Generating Company and any other company which the Board of Directors of the Company deems to be "now affiliated or associated" for the purpose of transfers or other specified purpose and so declares by resolution.

For the sole purpose of qualifying under the Plan so as to entitle an employee to have Future Service Retirement Income accrue to him, service with a company which is at the time of his employment by the Company a subsidiary, an associate or affiliate of the Company shall be deemed to be service with the Company provided such service is immediately prior to employment by the Company.

SECTION II. ELIGIBILITY

1. Present Employees Included in the Plan on July 1, 1944. Each full-time regular employee of the Company on July 1, 1944 is included in the Plan (subject to the provisions of the last paragraph of this subsection 1 of Section II) on that date if he has immediately prior to such date completed at least one year of continuous service with the Company or with companies or properties affiliated or associated with the Company, and, if a man, has attained his 30th but not 65th birthday and, if a woman, has attained her 25th but not her 60th birthday.

Present Employees Qualifying After July 1, 1944. Each other full-time regular employee of the Company on July 1, 1944 will be included in the Plan (subject to the provisions of the last paragraph of this subsection 1 of Section II) on the first day of the month immediately following the date on which he first completes such service and has attained such age of 30 or 25, as the case may be, provided that at the date of the com-

pletion of such service he has not attained his 65th birthday if a man or her 60th birthday if a woman.

Future Employees Qualifying under the Plan. Each full-time regular employee who enters the service of the Company after July 1, 1944 will be included in the Plan (subject to the provisions of the last paragraph of this subsection 1 of Section II) on the first day of the month immediately following the date on which he first completes such service and attains such age of 30 or 25, as the case may be, provided he has not, on such date, attained his 56th birthday if a man or her 51st birthday if a woman.

Inclusion After January 1, 1951. The first three paragraphs of this subsection are qualified by the provisions hereof that with respect to employees included under the Plan, before January 1, 1951, the date of inclusion in the Plan, for the purpose of payments on and after January 1, 1951, subject to the provisions of Section VII hereof, shall be the first day of the month immediately following the date on which an employee first completes one year of such service and attains the age of 25, if such date is earlier than the date of inclusion under pursuant to the provisions of the first three paragraphs of this subsection; and that with respect to employees not included in the Plan before January 1, 1951, the date of inclusion in the Plan shall be the first day of the month immediately following the date on which the employee first completes one year of such service and attains the age of 25, provided such employee has not on such date attained the age of 56. The foregoing does not restrict the right of transfer to this Plan from the plan of a company now affiliated or associated with the Company with substantially the same terms as this Plan pursuant to subsection 5 of Section III notwithstanding the fact that at the time of transfer to this Company, the tranferred employee has attained his 56th birthday.

2. Persons in Military Service and Employees on Authorized Leave of Absence. Any person not already included in the Plan who leaves or has left the employ of the Company to enter

the Armed Forces of the United States or is on authorized leave of absence without regular pay and who returns to the employ within a reasonable time after discharge from such service (which reasonable time shall not in any event be construed to be less than 90 days or such longer period as may be fixed by law) or at or before termination of his leave of absence, shall, upon such return, be included in the Plan if and when he has met the requirements of subsection 1 of this Section. In determining continuity or immediacy of service referred to in such subsection, the period of such absence in the Armed Forces of the United States or on such authorized leave of absence without regular pay shall be deemed not to have existed.

An employee who is on authorized leave of absence and receiving his regular pay shall be considered a full-time regular employee and shall be included in the Plan if and when he meets the requirements of subsection I of this Section regardless of whether he is, on the date of such inclusion, on such leave of absence.

SECTION III. DETERMINATION OF ACCREDITED SERVICE

1. Accredited Service. Each employee included in the Plan in accordance with Section II shall be credited with Accredited Service in accordance with the definition of that term in Section I hereof.

2. Crediting of Past Service. Past Service, if any, as defined in Section I, shall be credited to all employees included in the Plan (a) who were so included on July 1, 1944, (b) who were on the payroll on July 1, 1944 and subsequently were included in the Plan without lapse of employment since July 1, 1944, or (c) who were on authorized leave of absence without regular pay or in the Armed Forces on July 1, 1944 and were included in the Plan on or after their return to the employ of the Company as provided in Section II hereof. Employees designated in (c) above shall not be credited with Past Service for the period of such leave of absence or service in the Armed Forces, except

as provided in subsection 3(a) of this Section III. No other employee included in the Plan shall be entitled to such Past Service.

3. Crediting of Future Service. Each employee included in the Plan in accordance with Section II shall be credited with Future Service as defined in Section I for service rendered to the Company subsequent to the date of his inclusion in the Plan. Any such employee who is on authorized leave of absence with regular pay shall be credited with Future Service during the period of such absence. Employees on authorized leave of absence without regular pay and persons in the Armed Forces shall not be credited with Future Service for the period of such absence, except as provided in subsection 3(a) of this Section III.

3(a). Crediting of Certain Periods of Absence while in Military Service. An employee who is in the active service of the Company on January 1, 1966 and who is included in the Plan on that date who meets the requirements of paragraphs (A), (B) and (C) below with respect to his absence from the service of the Company while on active duty in the Armed Forces of the United States during either or both or any part of the periods specified in paragraph (B) shall, subject to the provisions of the next sentence, be credited with Accredited Service for the period or periods of his absence between the date specified, or for so much of such period or periods of his absence as meets the requirements of paragraphs (A), (B) and (C). The aggregate of the periods of such absence to be credited to such employee may not exceed the period of his continuous service with the Company immediately prior to his inclusion in the Plan which does not constitute Accredited Service, less one year of continuous service required for eligibility under Section II. For the purpose of determining such period of continuous service and such continuity of service, a period of absence in the Armed Forces of the United States or an authorized leave of absence without pay shall be deemed not to have existed.

(A) He left the employ of the Company and entered the Armed Forces of the United States directly upon leaving the employ of the Company. He served on active duty during either or both or any part of the periods specified in (B) for not less than 120 days. He returned to the employ of the Company within 90 days after he first became eligible for discharge or release from active duty with such Armed Forces under honorable conditions.

(B) December 1, 1941 to December 31, 1946 and June 1, 1950 to December 31, 1955.

(C) Only so much of any period of absence during the periods specified in (B) as would have constituted Accredited Service had he continued in the employ of the Company instead of entering the Armed Forces shall be taken into account. Any period of absence during the periods specified in (B) of an employee who is considered a new employee under subsection 4 of Section III which occurred prior to the time he most recently became a new employee in accordance with subsection 4 of Section III shall not be taken into account.

An employee who, in accordance with this subsection 3(a) is entitled to be credited with Future Service with respect to all or part of his period of absence while on active duty in the Armed Forces of the United States shall be deemed to have been paid earnings during such period of absence or part thereof at the rate being paid to him immediately prior to the time he left the employ of the Company to enter the Armed Forces of the United States.

4. Employees Leaving Company's Service. If the service of an employee of the Company is terminated prior to retirement as provided by Section IV such employee will forfeit any Accredited Service which he may have, provided, however, that this shall not affect the rights, if any, of an employee under Section VII nor shall the rights of an employee be affected during or by reason of a lay-off, due to lack of work, which continues for a period of one year or less, except that such period of lay-off shall not be deemed to be service with the Company.

If the service of an employee is terminated, or if he is not re-employed before the expiration of one year after being laid off for lack of work, and he is subsequently re-employed, he will, for the purposes of this Plan, be considered a new employee.

Forfeitures arising by reason of an employee's termination of service for any reason shall not be applied to increase the benefits any employee would otherwise receive under the Plan at any time prior to the termination of the Plan or the complete discontinuance of contributions by the Company thereunder.

5. Transfers to or from Affiliated Companies. In the case of the transfer of an employee of the Company to any company now affiliated or associated with the Company which has at the time of transfer a pension plan with substantially the same terms as this Plan, such employee, if and when he commences to receive on or after Normal Retirement Date retirement income under such plan of the company to which transferred, shall also receive Retirement Income under this Plan based upon his Accrued Future Service Retirement Income at the time of his transfer plus that proportionate part of his Past Service Retirement Income as the actuarial value of the Company's contributions for Past Service Retirement Income for all employees at the time of his transfer bears to the actuarial value of the Past Service Retirement Income for all employees. The proportionate part of such employee's Past Service Retirement Income so determined shall thereafter be considered to be his Accrued Past Service Retirement Income for all purposes of this Plan, including particularly Section XIII. If and when such an employee commences to receive on an Early Retirement Date retirement income under such plan of the company to which transferred, the amount of any Retirement Income payable to him in accordance with the provisions of this subsection 5 of Section III shall be the Retirement Income hereinabove in this paragraph referred to reduced in accordance with the provisions of the Plan relating to Retirement Income payable at Early Retirement Date.

In the case of the transfer to this Company of an employee of any company now affiliated or associated with the Company which has at the time of transfer a pension plan with substantially the same terms as this Plan, the Company will, subject to the provisions of Section X, make periodical contributions into this Plan to the extent necessary to provide the portion of the Retirement Income not provided for him in the pension plan of the company from which he was transferred.

In no case, however, shall any such employee who retires pursuant to subsection 1, 2 or 3 of Section IV hereof, or the Provisional Payee of a deceased employee entitled to payment in accordance with subsection 2 of Section VI, receive Retirement Income from both plans aggregating less than the minimum Retirement Income specified in subsection 4 of Section V. In the event that the aggregate of the Accrued Retirement Incomes under both plans does not equal the minimum Retirement Income for any retired employee, or the Provisional Payee of a deceased employee entitled to payment in accordance with subsection 2 of Section VI, then each company shall increase its payment by that proportionate part of the deficiency as the Accrued Retirement Income for such employee under its plan bears to the aggregate of the Accrued Retirement Incomes for such employee.

In the event that any such transfer of an employee to or from affiliated or associated companies is made after July 1, 1944 but prior to the putting into effect of such pension plans by both companies, such transfer shall be considered to have been made as of July 1, 1944.

SECTION IV. RETIREMENT

1. Retirement at Normal Retirement Date. It is the intention of the Plan that employees will retire upon reaching Normal Retirement Date.

2. Retirement at Deferred Retirement Date. At the request of the Company and with the approval of the Board of Directors from year to year an employee included in the Plan may

remain in active service after his Normal Retirement Date for such year. Termination of service of such an employee for any reason after Normal Retirement Date shall be deemed retirement as provided in the Plan.

3. Retirement at Early Retirement Date. An employee having at least 20 years of Accredited Service (including any Accredited Service to which he is entitled under the pension plan of any company or companies now affiliated or associated with the Company, from which such employee was transferred pursuant to subsection 5 of Section III and including for the purposes of this subsection 3, Accredited Service under the Retirement Income Plan for Employees of Birmingham Electric Company, as amended) may elect to retire on an Early Retirement Date on or after his 55th birthday and before his 65th birthday (subject, however, to the consent of the Company if he has not attained age 60) and to have his Retirement Income under the Plan commence on that date. The amount of Retirement Income payable will be equal to the employee's Accrued Retirement Income on his Early Retirement Date reduced by 3/10ths of 1% for each calendar month by which his Early Retirement Date precedes his Normal Retirement Date. At the option of the employee exercised at the time of such retirement, provided he shall not have made a designation of a Provisional Payee pursuant to Section VI which has become effective, he may have his Retirement Income at Early Retirement Date adjusted upwards in an amount which will make his Retirement Income payable up to age 65 equal, as nearly as may be, to the amount of his Federal primary Social Security benefits (primary old age insurance benefit) estimated to become payable after age 65, as computed at the time of his retirement, plus a reduced amount, if any, of Retirement Income actuarially determined to be payable after such age 65.

SECTION V. RETIREMENT INCOME

1. Normal Retirement Income. The monthly Retirement Income payable to an employee who retires from the service

of the Company at Normal Retirement Date will be the sum of his monthly Future Service Retirement Income and Past Service Retirement Income, if any, calculated pursuant to this Section V.

While the Company hopes and expects to continue the Plan indefinitely, it reserves the right to terminate or modify it subject to the provisions of Section XV hereof; moreover, the cost of providing Past Service Retirement Incomes (including any unfunded part of the benefits resulting from amendments subsequent to July 1, 1944) is to be provided over a period of years. Nothing herein is to be construed as requiring the Company to continue to make Future Service contributions as described in Section X, or to complete the making of Past Service contributions as described in Section X, subject to the provisions of Section XV hereof, or to confer upon the employees any rights other than those they may have hereunder with respect to the funds held in the Trust Fund, which with the income thereon can never, prior to the satisfaction of all liabilities with respect to employees under the Plan, be used or diverted to purposes other than for the exclusive benefit of the employees.

2. Calculation of Future Service Retirement Income. The annual Future Service Retirement Income receivable on and after January 1, 1951 by each employee included in the Plan who retires or has retired from the service of the Company at Normal Retirement Date will be the sum of

(a) 1% of each fiscal year's earnings up to $3,000 during the period of Future Service up to January 1, 1956, 1¼% of each fiscal year's earnings up to $4,200 during the period of Future Service on and after January 1, 1956 and up to January 1, 1961, 1.33% of each fiscal year's earnings up to $4,800 during the period of Future Service on and after January 1, 1961 and up to January 1, 1966 and 1.33% of each fiscal year's earnings up to $6,600 during the period of Future Service on and after January 1, 1966 and up to January 1, 1971, and 1.50% of each fiscal year's earnings up to $7,800 during the period of Future Service on and

after January 1, 1971 up to January 1, 1972, and 1.50% of each fiscal year's earnings up to $9,000 during the period of Future Service on and after January 1, 1972; and

(b) 1½% of each fiscal year's earnings in excess of $3,000 during the period of Future Service up to January 1, 1956, 1¾% of each fiscal year's earnings in excess of $4,200 during the period of Future Service on and after January 1, 1956 and up to January 1, 1961, and 2% of each fiscal year's earnings in excess of $4,800 during the period of Future Service on and after January 1, 1961 and up to January 1, 1966 and 2% of each fiscal year's earnings in excess of $6,600 during the period of Future Service on and after January 1, 1966 and up to January 1, 1971, and 2% of each fiscal year's earnings in excess of $7,800 during the period of Future Service on and after January 1, 1971 and up to January 1, 1972, and 2% of each fiscal year's earnings in excess of $9,000 during the period of Future Service on and after January 1, 1972.

Future Service Retirement Income will be payable monthly at 1/12th of the annual amount determined as above. In the case of an employee who did not have earnings in each month in any such fiscal year, the above-mentioned dollar limits shall be reduced in the amount of 1/12th thereof for each such month during which he had no earnings before applying the designated percentages. The fiscal year shall be as determined by the Retirement Board.

The amendments to the Plan effective as of January 1, 1971 have been adopted in the light of and with regard to the maximum amount of remnueration of an individual upon which the tax for old age insurance is imposed by the Federal Insurance Contribution Act, $7,800 commencing January 1, 1971, and $9,000 commencing January 1, 1972. If such amount ($9,000) shall be increased, from time to time, the Company, in its discretion, may amend the Plan to substitute such larger amounts in place of $9,000 referred to in paragraphs (a) and (b) of this subsection 2.

3. Calculation of Past Service Retirement Income. The monthly amount of Past Service Retirement Income receivable on and after January 1, 1951 by each employee with Past Service included in the Plan who retires or has retired from the service of the Company at Normal Retirement Date will be equal to 1¼% of the employee's monthly rate of earnings as of April, 1943, multiplied by the number of years (including credit for completed months) of Past Service as defined in Section I. If such employee was not in the active service of the Company in April, 1943, then the monthly rate of earnings shall be as of the nearest prior month in which he was in such service or, if he has had no service prior to April, 1943, then as of the first month of such service. Such monthly rate of earnings in the case of an employee paid weekly or bi-weekly shall be considered to be equivalent to the regular hourly rate of pay times the number of hours in the regular work week times 4⅓.

4. Minimum Retirement Income. (a) Subject to the provisions of Sections VI and VII and to the provisions of paragraph (b) (i) of this subsection 4, if minimum Retirement Income computed in accordance with such paragraph shall be greater, the minimum Retirement Income payable on and after January 1, 1961 to an employee included in the Plan retiring or retired from the service of the Company at Normal Retirement Date, who has (or had at his Normal Retirement Date) 30 or more years of service (whether or not Accredited Service) with the Company (including service with companies or properties now affiliated or associated with the Company, service with companies or properties heretofore so affiliated or associated prior to the date of severance of such affiliation or association and service with Birmingham Electric Company) shall be such amount as, together with one-half of any Federal primary Social Security benefit (primary old age insurance benefit) payable to such employee at the time of retirement (regardless of when he retired or retires) or which upon application would be or would have been payable to him or which would be or would have been payable if the employee had not disqualified himself to receive payment thereof, plus any benefit payable to him under

the Retirement Income Plan for Employees of Birmingham Electric Company, shall equal $125 per month. If such employee has, or at his Normal Retirement Date had, less than 30 years of such service, such minimum shall be reduced $1.50 for each full year less than 30 years. In the event of any change in the amount of any Federal primary Social Security benefit payable to such employee after retirement, such minimum Retirement Income will not be adjusted.

In the case of a retired female employee entitled to receive minimum Retirement Income under this subsection 4(a) on and after January 1, 1961 whose Normal Retirement Date was the first day of the month after her 60th birthday, the amount of Federal primary Social Security benefit to be taken into account in accordance with this subsection 4(a) for the purpose of payments on and after January 1, 1961, shall be based on the Federal primary Social Security benefit payable, or which upon application would have been payable to her, or which would have been payable if the employee had not disqualified herself to receive payment thereof, on the first day of the month after the employee's 65th birthday.

(b) Retirement after January 1, 1966. (i) The minimum Retirement Income payable after January 1, 1966 to an employee included in the Plan retiring from the service of the Company after January 1, 1966 at Normal Retirement Date or Deferred Retirement Date (before adjustment for Provisional Payee designation, if any) shall be an amount equal to 1% of his monthly earnings on his Normal Retirement Date multiplied by his years of Accredited Service, reduced by an amount equal to one-half of the amount, if any, by which any Federal primary Social Security benefit (primary old age insurance benefit) to which he shall be entitled after attaining age 65 in accordance with the Social Security Act in force at his retirement or at his Normal Retirement Date, if earlier, shall exceed $168 per month. An employee shall be deemed to be entitled to receive Federal primary Social Security benefits after attaining age 65 regardless of the fact that he may have disqualified himself to receive payment thereof.

(ii) The minimum Retirement Income payable after January 1, 1966 to an employee included in the Plan retiring from the service of the Company after January 1, 1966 at his Early Retirement Date (before adjustment for Provisional Payee designation, if any) shall be an amount equal to 1% of his monthly earnings on his Early Retirement Date multiplied by his years of Accredited Service, reduced by an amount equal to one-half of the amount, if any, by which any Federal primary Social Security benefit (primary old age insurance benefit) to which it is estimated he will become entitled after attaining age 65, should he then be alive, computed at the time of his retirement in accordance with the Social Security Act in force at such time, shall exceed $168 per month; the amount remaining shall be further reduced by 3/10ths of 1% for each calendar month by which his Early Retirement Date precedes his Normal Retirement Date.

(iii) The Minimum Retirement Income payable after January 1, 1966 to the Provisional Payee of an employee in accordance with subsection 2 of Section VI by reason of the death of the employee on or after January 1, 1966 prior to retirement and after the effective date of his Provisional Payee designation, shall be based on an amount equal to 1% of the employee's monthly earnings at the time of his death (or his Normal Retirement Date, if earlier) multiplied by his years of Accredited Service, reduced by an amount equal to one-half of the amount, if any, by which any Federal primary Social Security benefit (primary old age insurance benefit) which it is estimated he would have been entitled to receive after attaining age 65, had he not died, computed at the time of his death in accordance with the Social Security Act in force at such time, shall exceed $168 per month; the amount remaining shall be further reduced by the actuarial adjustment for the Provisional Payee election in effect at the employee's date of death.

For the purposes of paragraphs (i), (ii) and (iii), in determining the number of years of Accredited Service, completed months of service will be counted as fractions of a year.

For the purposes of paragraphs (i), (ii) and (iii), in the case of an employee of Birmingham Electric Company who, prior to Normal Retirement Date, became an employee of the Company by reason of the merger of the former into the latter: (a) to the number of years of his Accredited Service to be taken into account there shall be added any years of Accredited Service accrued to him to December 1, 1952 under the Retirement Income Plan for Employees of Birmingham Electric Company; (b) the amount determined by multiplying 1% of his monthly earnings by his years of Accredited Service (including his Accredited Service to December 1, 1952 under the Retirement Income Plan for Employees of Birmingham Electric Company) as provided in paragraphs (i), (ii) and (iii) shall be reduced by the amount of retirement income, if any, accrued to the employee to December 1, 1952 under the Retirement Income Plan for Employees of Birmingham Electric Company.

(c) Retirement After January 1, 1971. Upon the occurrence after January 1, 1971 of any of the several events referred to in paragraphs (i), (ii) and (iii) of paragraph (b) of this subsection 4, the minimum Retirement Income payable to an employee after January 1, 1971 shall be determned in accordance with the following provisions:

(A) Upon the retirement of an employee from the service of the Company after January 1, 1971 at Normal Retirement Date or Deferred Retirement Date, the minimum Retirement Income payable to him after January 1, 1971 shall be determined in accordance with the provisions of paragraph (i) of paragraph (b), modified as follows: There shall be substituted in place of "January 1, 1966", "January 1, 1971" and in place of "1%" there shall be substituted "1.075%"; after "$168 per month", there shall be added "but in no event shall such reduction exceed 60% of the amount of his estimated Federal primary Social Security benefit". To the end of paragraph (i) there shall be added: "In estimating the amount of the Federal primary Social Security benefit to which the employee would be entitled at age 65,

it shall be assumed that he will receive no wages for Social Security purposes after his Normal Retirement Date and it will be further assumed in calculating his estimated Federal primary Social Security benefits that the amount thereof will be the amount determined under the recomputation provision, if applicable, of the Social Security Act in effect at his retirement or at his Normal Retirement Date, if earlier."

(B) Upon the retirement of an employee from the service of the Company after January 1, 1971 at his Early Retirement Date, the minimum Retirement Income payable to him after January 1, 1971 shall be determined in accordance with the provisions of paragraph (ii) of paragraph (b), modified as follows: There shall be substituted in place of "January 1, 1966", "January 1, 1971" and in place of "1%" there shall be substituted "1.075%"; after "$168 per month", there shall be added "but in no event shall such reduction exceed 60% of the amount of his estimated Federal primary Social Security benefit". To the end of paragraph (ii) there shall be added: "In estimating the amount of the Federal primary Social Security benefit to which the employee would be entitled at age 65, it shall be assumed that he will receive no wages for Social Security purposes after his Early Retirement Date and it will be further assumed in calculating his estimated Federal primary Social Security benefits that the amount thereof will be the amount determined under the recomputation provision, if applicable, of the Social Security Act in effect at his Early Retirement Date."

(C) The minimum Retirement Income payable after January 1, 1971 to the Provisional Payee of an employee in accordance with paragraph (iii) of paragraph (b) by reason of the death of the employee after January 1, 1971 prior to retirement and after the effective date of his Provisional Payee designation shall be determined in accordance with the provisions of paragraph (iii) of paragraph (b) modified as follows: There shall be substituted in place of "January 1,

1966", "January 1, 1971" and in place of "1%" there shall be substituted "1.075%"; after "$168 per month" there shall be added "but in no event shall such reduction exceed 60% of the amount of his estimated Federal primary Social Security benefit". To the end of the first paragraph of paragraph (iii) there shall be added: "In estimating the amount of Federal primary Social Security benefit to which the employee would have been entitled at age 65, had he not died, it shall be assumed that he would not have received any wages for Social Security purposes after the date of his death and it will be further assumed in calculating his estimated Federal primary Social Security benefits that the amount thereof will be the amount determined under the recomputation provision, if applicable, of the Social Security Act in effect at the time of his death."

5. Deferred Retirement Income. The monthly amount of Retirement Income commencing at Deferred Retirement Date will be the same monthly amount as if the employee had, in fact, retired at Normal Retirement Date.

6. Early Retirement Income. The monthly amount of Retirement Income commencing at Early Retirement Date will be as provided in subsection 3 of Section IV.

7. Earnings. The word "earnings" as used in the Plan means the salary or wages paid to the employee within any specified period without including overtime and before deductions for taxes, social security, etc.

8. Payment of Retirement Income. The first payment of an employee's Retirement Income will be made on his Normal Retirement Date or Deferred Retirement Date or Early Retirement Date, as the case may be. In the event of the death of an employee who has designated a Provisional Payee in accordance with Section VI, if the designation has become effective, the first payment to be made to the Provisional Payee pursuant to that Section will be made to the Provisional Payee on the first day of the month after the employee's death, if the Provisional Payee shall then be alive and proof of the employee's

death satisfactory to the Retirement Board shall have been received by it. Subsequent payments will be made monthly thereafter.

Notwithstanding the provisions herein for the monthly payment of Retirement Income, such income will be payable quarterly, semi-annually or annually in adjusted amounts as the Retirement Board may determine if the amount of the Retirement Income is less than $10 per month.

9. Termination of Retirement Income. The monthly payment of the Retirement Income will cease with the last payment preceding the retired employee's death; subject, however, to the continuation of payments to a surviving Provisional Payee, if one has been designated, which likewise will cease with the last payment preceding the death of the Provisional Payee. There shall be no benefits payable under the Plan on behalf of any employee whose death occurs prior to his retirement, except as otherwise provided in Section VI with respect to a Provisional Payee of an employee. Following the death of an employee and of his Provisional Payee, if any, no further payments will be made under the Plan on account of such employee or to his estate.

10. Retirement Income for service to January 1, 1956. Notwithstanding any other provision of the Plan, including but not limited to subsection 5 of Section V, Accrued Retirement Income with respect to service prior to January 1, 1956 shall be recomputed in accordance with the following provisions. For the purpose of this subsection 10 the term "transferor" shall mean any company now affiliated or associated with the Company from which an employee was transferred pursuant to subsection 5 of Section III and the term "transferee" shall mean any company now affiliated or associated with the Company to which an employee was transferred from the Company pursuant to subsection 5 of Section III.

(a) Each employee who was in the active service of the Company on January 1, 1956 and included in the Plan on that date shall be entitled, with respect to his Accrued Retirement

Income for services prior to January 1, 1956 under the Plan or under the plan of any transferor, to such increase, if any, in the amount of his Accrued Retirement Incomes as will bring the aggregate of his Accrued Retirement Incomes to January 1, 1956 to an amount equal to 1% of his monthly earnings on January 1, 1955 (from the Company or from any transferor) multiplied by his years of service from the earlier of (1) the date of the beginning of his Accredited Service under the Plan, or (2) the date of the beginning of his Accredited Service under the plan of any transferor (Accredited Service being determined as under the Plan if resulting in an earlier date), to January 1, 1956. Completed months of service will be counted as fractions of a year for this purpose. In the case of an employee transferred to the Company, pursuant to subsection 5 of Section III, between January 1, 1955 and January 1, 1956 from a transferor which does not have a similar provision with respect to service prior to January 1, 1956 applicable to such employee, his initial monthly earnings received from the Company will be used instead of his monthly earnings on January 1, 1955, if the former be higher.

(b) In the event that an employee of the Company then included in the Plan was, prior to January 1, 1956, transferred to a transferee which has a similar provision with respect to service prior to January 1, 1956 applicable to such employee, he will be entitled, under the Plan, to that part of the aggregate of his Accrued Retirement Income as computed in accordance with paragraph (a) of this subsection 10 in the proportion that his Accrued Retirement Income under the Plan for his years of service prior to January 1, 1956 bears to the aggregate of the Accrued Retirement Incomes for such employee for such years of service, as computed before recomputation of his Retirement Income pursuant to paragraph (a) of this subsection 10.

(c) An employee of the Company who meets the requirements of paragraph (a) of this subsection 10 and who was transferred from a transferor shall be entitled to such Retirement Income under the Plan with respect to his service prior

to January 1, 1956 as shall be sufficient, together with the Accrued Retirement Income under the plan of such transferor, to bring his aggregate Accrued Retirement Income for such period of service to January 1, 1956 to the amount computed in accordance with paragraph (a) of this subsection 10.

(d) The Retirement Income of any employee who retired under the provisions of the Plan on any Retirement Date on or before January 1, 1956, or his Provisional Payee, shall be recalculated effective January 1, 1956 in accordance with the provisions of paragraphs (a), (b) and (c) of this subsection 10, except that the date of his retirement shall be substituted for "January 1, 1956" wherever the expression "to January 1, 1956" appears therein and his monthly earnings at the time of his retirement shall be used in lieu of his monthly earnings on January 1, 1955. In no event, however, shall any such retired employee receive an increase of less than $25 per month if he had 30 or more years of service (whether or not Accredited Service) at the date of his retirement. For any such employee who had less than 30 years of such service such minimum increase shall be reduced $1 for each full year less than 30 years.

(e) The recalculation of Retirement Income provided for in this subsection 10 shall not be applicable to any person entitled to receive Retirement Income under the provisions of Section VII of the Plan whose service has terminated prior to January 1, 1956, but such person shall only be entitled to Retirement Income in accordance with the provisions of the Plan in effect at the time his service was terminated.

(f) For the purposes of this subsection 10, an employee of Birmingham Electric Company who, prior to Normal Retirement Date became an employee of the Company by reason of the merger of the former into the latter and continued in employment with the Company and was an active employee of the Company on January 1, 1956, or was retired under the Plan since December 1, 1952, shall be considered to have been transferred to the Company pursuant to the provisions of subsection 5 of Section III.

11. Retirement Income for Service to January 1, 1961. Notwithstanding any other provision of the Plan, Accrued Retirement Income with respect to service prior to January 1, 1961 shall be recomputed in accordance with the following provisions. For the purpose of this subsection 11 the term "transferor" shall mean any company now affiliated or associated with the Company from which an employee was transferred pursuant to subsection 5 of Section III and the term "transferee" shall mean any company now affiliated or associated with the Company to which an employee was transferred from the Company pursuant to subsection 5 of Section III.

(a) Each employee who was in the active service of the Company on January 1, 1961 and who was included in the Plan on that date who had not then reached his Normal Retirement Date shall be entitled, with respect to his Accrued Retirement Income for services prior to January 1, 1961 under the Plan or under the plan of any transferor, to such increase, if any, in the amount of his Accrued Retirement Incomes as will bring the aggregate of his Accrued Retirement Incomes to January 1, 1961 to an amount equal to 1% of his monthly earnings on January 1, 1960 (from the Company or from any transferor) multiplied by his years of Accredited Service from the earlier of (1) the date of the beginning of his Accredited Service under the Plan, or (2) the date of the beginning of his Accredited Service under the plan of any transferor (Accredited Service being determined as under the Plan if resulting in an earlier date) to January 1, 1961. Completed months of service will be counted as fractions of a year for this purpose.

(b) In the event that an employee of the Company then included in the Plan was, prior to January 1, 1961, transferred to a transferee which has a similar provision with respect to service prior to January 1, 1961 applicable to such employee, he will be entitled, under the

Plan, to that part of the aggregate of his Accrued Retirement Incomes as computed in accordance with paragraph (a) of this subsection 11 in the proportion that his Accrued Retirement Income under the Plan for his years of service prior to January 1, 1961 bears to the aggregate of the Accrued Retirement Incomes for such employee for such years of service, as computed before recomputation of his Retirement Income pursuant to paragraph (a) of this subsection 11.

(c) An employee of the Company who meets the requirements of paragraph (a) of this subsection 11 and who was transferred from a transferor shall be entitled to such Retirement Income under the Plan with respect to his service prior to January 1, 1961 as shall be sufficient, together with the Accrued Retirement Income under the Plan of such transferor, to bring his aggregate Accrued Retirement Incomes for such period of service to January 1, 1961 to the amount computed in accordance with paragraph (a) of this subsection 11.

(d) The Retirement Income of any employee who retired under the provisions of the Plan on any Retirement Date on or before January 1, 1961, or his Provisional Payee, and the Accrued Retirement Income of any employee who was in the active service of the Company on January 1, 1961 and who was included in the Plan on that date but who then or prior thereto had reached his Normal Retirement Date, or his Provisional Payee, shall be recalculated effective January 1, 1961 in accordance with the provisions of paragraphs (a), (b) and (c) of this subsection 11, except that the date of his retirement, or his Normal Retirement Date, if earlier, shall be substituted for "January 1, 1961" wherever the expression "to January 1, 1961" appears therein and his monthly earnings at the time of his retirement, or at his Normal Retirement Date, if earlier, shall be used in lieu of his monthly earnings on January 1, 1960. In no event, however, shall any such re-

tired employee or any employee included in the Plan in active service on January 1, 1961 who prior thereto had reached his Normal Retirement Date receive an increase of less than $25 per month (or the actuarial equivalent thereof in the case of early retirement or the designation of a Provisional Payee) if he has or had 30 or more years of service (whether or not Accredited Service) at the date of his retirement. For any such employee who had less than 30 years of such service such minimum increase shall be reduced $1 for each full year less than 30 years.

(e) If on the date as of which it is in this subsection 11 provided that an employee's or retired employee's monthly earnings shall be used for the purpose of a recalculation to be made pursuant to this subsection 11, an employee or retired employee was on authorized leave of absence and he was on such applicable date receiving no earnings or was receiving earnings less than his monthly earnings immediately prior to the grant of his authorized leave of absence, his monthly earnings immediately prior to the time his authorized leave of absence was granted shall be used for the purpose of such recalculation instead of his monthly earnings at the otherwise applicable date specified in this subsection 11.

(f) The recalculation of Retirement Income provided for in this subsection 11 shall not be applicable to any person entitled to receive Retirement Income under the provisions of Section VII of the Plan whose service has terminated prior to January 1, 1961, but such person shall only be entitled to Retirement Income in accordance with the provisions of the Plan in effect at the time his service was terminated.

(g) For the purposes of this subsection 11, an employee of Birmingham Electric Company who, prior to Normal Retirement Date became an employee of the Company by reason of the merger of the former into the latter

and continued in employment with the Company and was an active employee of the Company on January 1, 1961, or was retired under the Plan since December 1, 1952, shall be considered to have been transferred to the Company pursuant to the provisions of subsection 5 of Section III.

12. Retirement Income for Service to January 1, 1966. Notwithstanding any other provision of the Plan, Accrued Retirement Income with respect to service prior to January 1, 1966 shall be recomputed in accordance with the following provisions. For the purpose of this subsection 12 the term "transferor" shall mean any company now affiliated or associated with the Company from which an employee was transferred pursuant to subsection 5 of Section III and the term "transferee" shall mean any company now affiliated or associated with the Company to which an employee was transferred from the Company pursuant to subsection 5 of Section III.

(a) Each employee who was in the active service of the Company on January 1, 1966 and who was included in the Plan on that date and who had not then reached his Normal Retirement Date shall be entitled, with respect to his Accrued Retirement Income for services prior to January 1, 1966 under the Plan or under the plan of any transferor, to such increase, if any, in the amount of his Accrued Retirement Incomes as will bring the aggregate of his Accrued Retirement Incomes to January 1, 1966 to an amount equal to 1% of his monthly earnings on January 1, 1965 (from the Company or from any transferor) multiplied by his years of Accredited Service from the earlier of (1) the date of the beginning of his Accredited Service under the Plan, or (2) the date of the beginning of his Accredited Service under the plan of any transferor (Accredited Service being determined as under the Plan if resulting in an earlier date) to January 1, 1966. Completed

months of service will be counted as fractions of a year for this purpose.

(b) In the event that an employee of the Company then included in the Plan was, prior to January 1, 1966, transferred to a transferee which has a similar provision with respect to service prior to January 1, 1966 applicable to such employee, he will be entitled, under the Plan, to that part of the aggregate of his Accrued Retirement Incomes as computed in accordance with paragraph (a) of this subsection 12 in the proportion that his Accrued Retirement Income under the Plan for his years of service prior to January 1, 1966 bears to the aggregate of the Accrued Retirement Incomes for such employee for such years of service, as computed before recomputation of his Retirement Income pursuant to paragraph (a) of this subsection 12.

(c) An employee of the Company who meets the requirements of paragraph (a) of this subsection 12 and who was transferred from a transferor shall be entitled to such Retirement Income under the Plan with respect to his service prior to January 1, 1966 as shall be sufficient, together with the Accrued Retirement Income under the Plan of such transferor, to bring his aggregate Accrued Retirement Incomes for such period of service to January 1, 1966 to the amount computed in accordance with paragraph (a) of this subsection 12.

(d) The Retirement Income of any employee who retired under the provisions of the Plan on any Retirement Date on or before January 1, 1966, or his Provisional Payee, and the Accrued Retirement Income of any employee who was in the active service of the Company on January 1, 1966 and who was included in the Plan on that date but who then or prior thereto had reached his Normal Retirement Date, or his Provisional Payee, shall be recalculated effective January 1, 1966 in accordance with the provisions of paragraphs (a), (b) and (c) of this subsection 12, except that the date of

his retirement, or his Normal Retirement Date, if earlier, shall be substituted for "January 1, 1966" wherever the expression "to January 1, 1966" appears therein and his monthly earnings at the time of his retirement, or at his Normal Retirement Date, if earlier, shall be used in lieu of his monthly earnings on January 1, 1965.

(e) The Retirement Income of the Provisional Payee of an employee which is payable in accordance with subsection 2 of Section VI by reason of the death of the employee prior to retirement shall be recalculated effective January 1, 1966 in accordance with the provisions of paragraphs (a), (b) and (c) of this subsection 12, except that the date of his death (or his Normal Retirement Date, if earlier) shall be substituted for January 1, 1966, wherever the expression "to January 1, 1966" appears therein and his monthly earnings at the time of his death (or his Normal Retirement Date, if earlier) shall be used in lieu of his monthly earnings of January 1, 1965.

(f) For the purpose of a recalculation of Retirement Income to be made in accordance with this subsection 12 with respect to (i) an employee who retired on an Early Retirement Date on or before January 1, 1966, or his Provisional Payee, or (ii) with respect to the Provisional Payee of an employee who died on or before January 1, 1966 and prior to his retirement and who is referred to in the preceding paragraph (e), the amount of the Retirement Income payable at Early Retirement Date in respect of an employee who retired on his Early Retirement Date shall be recomputed in accordance with the provisions of subsection 3 of Section IV, and, in respect of an employee who died before retirement, his Accrued Retirement Income at the date of his death shall be recomputed in accordance with the provisions of subsection 2 of Section VI.

(g) If on the date as of which it is in this subsection 12 provided that an employee's or retired employee's monthly earnings shall be used for the purpose of a recalculation to be made pursuant to this subsection 12, an employee or retired employee was on authorized leave of absence and he was on such applicable date receiving no earnings or was receiving earnings less than his monthly earnings immediately prior to the grant of his authorized leave of absence, his monthly earnings immediately prior to the time his authorized leave of absence was granted shall be used for the purpose of such recalculation instead of his monthly earnings at the otherwise applicable date specified in this subsection 12.

(h) The recalculation of Retirement Income provided for in this subsection 12 shall not be applicable to any person entitled to receive Retirement Income under the provisions of Section VII of the Plan whose service has terminated prior to January 1, 1966, but such person shall only be entitled to Retirement Income in accordance with the provisions of the Plan in effect at the time his service was terminated.

(i) For the purpose of this subsection 12, an employee of Birmingham Electric Company who, prior to Normal Retirement Date became an employee of the Company by reason of the merger of the former into the latter and continued in employment with the Company and was an active employee of the Company on January 1, 1966, or was retired under the Plan since December 1, 1952, shall be considered to have been transferred to the Company pursuant to the provisions of subsection 5 of Section III.

13. Retirement Income for Service Prior to January 1, 1971. Retirement Income payable on and after January 1, 1971 to an employee who retired pursuant to the Plan before January 1, 1971 (or to his Provisional Payee) will be recalculated to in-

crease the amount thereof by an amount ranging from a minimum of 3% to a maximum of 15% in accordance with the following schedule.

Year in which early or normal retirement occurred:	Percentage Increase:
1970	3%
1969	6%
1968	9%
1967	12%
1966 and prior years	15%

A similar adjustment, based on the date of an employee's death, rather than retirement date, will be made in respect of Retirement Income which is payable on and after January 1, 1971 where a Provisional Payee election was in effect when an employee died while in service prior to January 1, 1971 and prior to his retirement.

The recalculation of Retirement Income provided for in this subsection 13 shall not be applicable to any person entitled to receive Retirement Income under the provisions of Section VII of the Plan whose service has terminated prior to January 1, 1971, but such person shall only be entitled to Retirement Income in accordance with the provisions of the Plan in effect at the time his service was terminated.

SECTION VI. PROVISIONAL PAYEE

1. An employee who desires to have his Retirement Income payable on or after the effective date of the designation of a Provisional Payee as hereinafter provided actuarially adjusted to provide, at his option, either

(a) a reduced amount payable to him for his lifetime with the provision that such reduced amount will be continued after his death to his spouse as Provisional Payee until the death of such Provisional Payee, or

(b) a reduced amount (greater than the amount in (a) above) payable to him for his lifetime with the pro-

vision that one-half of such reduced amount will be continued after his death to his spouse as Provisional Payee until the death of such Provisional Payee,

may, subject to the conditions outlined below, and in lieu of any other form or method of payment of Retirement Income, designate such spouse as a Provisional Payee and at the same time elect to have payments made in accordance with the provisions of this Section.

2. Adjustment of Retirement Income by reason of the designation of a Provisional Payee in the event of an employee's retirement on or after his 55th birthday will be based on the Retirement Income payable on his Early Retirement Date or Retirement Income payable on his Normal Retirement Date, as the case may be. If an employee who has designated a Provisional Payee dies prior to his retirement but after the effective date of his Provisional Payee designation, there will be payable to his Provisional Payee for life Retirement Income in a reduced amount in accordance with the employee's election of payments to be made to his Provisional Payee after the death of the employee under (a) or (b), as the case may be, of subsection 1 of this Section VI. The reduced amount payable to the Provisional Payee shall be based on the employee's Accrued Retirement Income at the date of his death actuarially adjusted.

Adjustments of Retirement Income shall be made in accordance with such actuarial tables as may be adopted by the Retirement Board and in use at the time of the employee's death or at his Early or Normal Retirement Date, as the case may be.

3. An election of payment and designation of a Provisional Payee in accordance with this Section shall be made in writing at the same time on a form prescribed by the Retirement Board and delivered to it. The election and designation shall specify its effective date which shall not be sooner than one year from the date the executed form is received by the Retirement Board or the employee's 55th birthday, whichever is later. The effective date may not be later than the date of commencement of payments in accordance with this Section VI.

An election of payment to be made in accordance with subsection 1(a) or (b) of this Section VI may be changed from 1(a) to 1(b) or vice versa by an employee provided the written election of the change specifies an effective date which shall not be sooner than one year from the date the Retirement Board receives the written election of change and provided the effective date of the change shall be prior to the date of commencement of payments in accordance with this Section VI. If an election of payment and designation has become effective at the time the election to change is received by the Retirement Board, or thereafter becomes effective, the original election of payment shall remain effective until the new election of payment shall become effective. To the extent that the new method of payment shall afford the employee changed protection in the event of his death after the effective date of the new election and prior to retirement, his Accrued Retirement Income shall be actuarially adjusted to reflect such changed protection.

If an employee's service terminates for any reason (including early retirement) prior to the effective date of an election and designation, the election and designation made pursuant to this Section shall be inoperative and the regular provisions of the Plan shall again become applicable as if a Provisional Payee had not been designated.

4. An election and designation made pursuant to this Section shall be inoperative and the regular provisions of the Plan shall again become applicable as if a Provisional Payee had not been designated if, prior to the commencement of any payments in accordance with this Section, (a) an employee's Provisional Payee shall die, except as provided in subsection 5 of this Section VI, or (b) the employee and the Provisional Payee shall be divorced, the divorce shall have become final and the Retirement Board shall have received the written request of the employee that the election and designation be inoperative, or (c) the Retirement Board shall have received the written election of the employee to rescind his election of payment and

designation of a Provisional Payee. If such election to rescind is made by the employee his Accrued Retirement Income shall be actuarially reduced to reflect the protection afforded the employee by the Provisional Payee designation during the period from its effective date to the date of the Retirement Board's receipt of the employee's election to rescind.

5. If the Provisional Payee dies after the employee's Normal Retirement Date but prior to the employee's Deferred Retirement Date, upon retirement the employee will be entitled to receive the reduced Retirement Income he would have received in accordance with this Section had he retired on his Normal Retirement Date.

6. If an employee who has made an election and designation in accordance with this Section terminates his services on or after the effective date of such designation under such circumstances as to entitle him to payment of Retirement Income in accordance with Section VII of the Plan (but for his election and designation in accordance with this Section), and such employee shall die prior to his Normal Retirement Date, there will be payable to his Provisional Payee for life Retirement Income in a reduced amount in accordance with the employee's election of payments to be made to his Provisional Payee after the death of the employee under (a) or (b), as the case may be, of subsection 1 of this Section VI. The reduced amount payable to the Provisional Payee shall be based upon the employee's Accrued Retirement Income at the date of the termination of his service actuarially adjusted. If the employee shall be alive on his Normal Retirement Date, a reduced amount of Retirement Income, determined in accordance with this Section VI, based upon his Accrued Retirement Income at the date of the termination of his service will be payable to him commencing on his Normal Retirement Date, with payments in the same or reduced amount to be continued to his Provisional Payee for life after the employee's death in accordance with his election. Payments in accordance with this subsection 6 will only be made if application to the Company is made within 5 years after the death of the employee, if he shall die prior to his

Normal Retirement Date, or within 5 years after his Normal Retirement Date, if he shall be alive on that date.

7. If without any election and designation made in accordance with this Section VI an amount would have been added to any monthly payment of Retirement Income to conform to the minimum Retirement Income provisions of subsection 4(a) of Section V, then such amount shall be added to the reduced amount payable to an employee who has a Provisional Payee, but after the death of such employee the payments to his Provisional Payee shall be limited to such reduced amount of Retirement Income without any addition thereto.

8. If an employee included in the Plan who is also included in the Retirement Income Plan for Employees of Birmingham Electric Company elects by his designation and election filed pursuant to this Section VI to have his Retirement Income under the Plan actuarially adjusted and paid in accordance with the provisions of this Section VI, he shall, if he further makes the election and executes the waiver provided in this subsection 8, be entitled to have added to his Accrued Retirement Income under the Plan an amount equal to his Accrued Retirement Income under the Retirement Income Plan for Employees of Birmingham Electric Company. The aggregate of such Accrued Retirement Incomes shall be adjusted and paid in accordance with the provisions of this Section VI. An election made pursuant to this subsection shall be irrevocable and shall be made on a form prescribed by the Retirement Board and filed with it at the time the employee's designation and election is filed. It shall be a condition of such election that an employee waive and forfeit any right to the payment of any Accrued Retirement Income to which he would otherwise be entitled under the Retirement Income Plan for Employees of Birmingham Electric Company.

9. The amendments to the Plan to be effective as of January 1, 1971, are subject to the receipt by the Company of a favorable letter of determination of the Internal Revenue Service, and the approval of the amendments by the stockholders of the Company. Notwithstanding the existence of these con-

ditions, prior to August 1, 1971, an election and designation of Provisional Payee may be made or changed, as may an election of payments, in accordance with the provisions of this Section VI, amended effective as of January 1, 1971, subject to all of the provisions of this subsection 9.

(a) Any election of payment and designation of a Provisional Payee or change made in accordance with this subsection shall be received by the Retirement Board on or prior to August 1, 1971.

(b) The effective date of the election and designation of the Provisional Payee shall be as specified therein, which may not be sooner than the employee's 55th birthday, nor sooner than the date the executed form is received by the Retirement Board and may not be later than a date specified in the form which date may not be later than the date of commencement of payments in accordance with Section VI.

(c) Prior to the date of receipt by the Retirement Board of the executed form referred to in (b) the employee shall have attained his 54th birthday but not his Normal Retirement Date.

(d) An election of payment to be made in accordance with subsection 1(a) or (b) of Section VI may be changed as provided in subsection 3 except that the effective date of such change may be less than one year from the date the Retirement Board receives the written election of change but not later than the date of commencement of payments in accordance with Section VI.

(e) If on or prior to August 1, 1971, the Plan as amended effective as of January 1, 1971, shall be declared effective as of the latter date any election of payment and designation of a Provisional Payee or a change made in accordance with this subsection, shall be given effect in accordance with its terms. Pending such declaration by the Company, no payment shall be made in accordance with any such election and designation or change made pursuant to this subsection 9.

(f) If on or prior to August 1, 1971, the Plan as amended effective as of January 1, 1971, shall not be declared effective by the Company, any election of payment and designation or

change made in accordance with this subsection shall be null and void and of no force and effect and any payment to which the employee or his Provisional Payee may be entitled in accordance with the Plan shall be only such payment to which the employee or his Provisional Payee shall be entitled in accordance with the provisions of the Plan as they existed on December 31, 1970, without regard to the amendments proposed to be made effective as of January 1, 1971.

SECTION VII. TERMINATION OF SERVICE

If the services of an employee included in the Plan terminate for any reason other than death or transfer to an affiliated or associated company as provided by subsection 5 of Section III or retirement as provided by Section IV, and if such employee has had at least 20 years of service with the Company (including service with companies or properties now affiliated or associated with the Company, service with companies or properties heretofore so affiliated or associated prior to the date of severance of such affiliation or association and service with Birmingham Electric Company), whether or not Accredited Service, or has had at least 15 years of such service and has attained the age of 50 at the time of such termination he will receive, commencing at Normal Retirement Date, Retirement Income equal to his Accrued Retirement Income at the date of the termination of such service provided that he makes application to the Company for the payment of such Retirement Income at Normal Retirement Date or within 5 years thereafter. If such employee has had less than 20 years of such service or had not attained the age of 50 having had at least 15 years of such service, he shall have no rights to any Retirement Income under the Plan based upon his service prior to such termination.

For the purpose of this Section VII, service with the Company shall include active service with the Armed Forces of the United States if the employee enters active service or training in such Armed Forces directly from the employ of the Company

and after discharge or release therefrom under honorable conditions returns within a reasonable time to the employ of the Company and remains in such employ for a period of one year.

In no event shall such an employee be entitled to any Retirement Income until Normal Retirement Date nor shall the provisions as to minimum Retirement Income in subsection 4 of Section V be applicable to such an employee. The designation of any Provisional Payee by such an employee shall become inoperative upon the termination of his services unless such termination occurs within 10 years prior to Normal Retirement Date and either (a) the designation of the Provisional Payee was made and accepted prior to January 1, 1961 and such designation has not been rescinded, or (b) the designation of the Provisional Payee was made after January 1, 1961 and such termination of service occurred on or after the effective date of the election and designation made in accordance with Section VI.

Any person entitled to receive Retirement Income under the provisions of this Section VII shall only be entitled to Retirement Income in accordance with the provisions of the Plan in effect at the time his service was terminated.

SECTION VIII. NON-ALIENATION OF BENEFITS

No benefit under the Plan shall be subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance or charge, and any attempt so to anticipate, alienate, sell, transfer, assign, pledge, encumber or charge the same shall be void, nor shall any such benefit be in any manner liable for or subject to the debts, contracts, liabilities, engagements or torts of the person entitled to such benefit.

If any employee or retired employee or any Provisional Payee under the Plan is adjudicated bankrupt or attempts to anticipate, alienate, sell, transfer, assign, pledge, encumber or charge any benefit under the Plan, except as specifically provided in the Plan, then such benefit shall cease and terminate and in that event the Retirement Board shall hold or apply the same or any part thereof to or for the benefit of such employee

or retired employee or Provisional Payee in such manner as the Retirement Board may think proper.

SECTION IX. LIMITATION OF RIGHTS OF THE EMPLOYEE

This Plan shall not be deemed to constitute a contract between the Company and any employee or to be a consideration for, or condition of, the employment of any employee. Nothing contained in this Plan shall be deemed to give any employee the right to be retained in the service of the Company or to interfere with the right of the Company to discharge or retire any employee at any time. Inclusion under the Plan will not give any employee any right or claim to a Retirement Income except upon reaching Normal Retirement Date or Early Retirement Date and no employee or Provisional Payee shall be entitled to any right or claim to a Retirement Income except to the extent such right is specifically fixed under the terms of the Plan and there are funds available therefor in the hands of the Trustee.

SECTION X. CONTRIBUTIONS

1. Contributions Generally. All contributions to provide the Retirement Incomes under the Plan will be made by the Company and no contributions will be required of the employees. All contributions shall be made to the Trustee under the Trust Agreement provided for in Section XII. The contributions of the Company shall be payable at such intervals as may be agreed upon by the Company and the Retirement Board, and each payment shall consist of an amount equal to the total of

> Contribution to cover the Future Service cost of the Plan, herein called the "Future Service Contribution",
>
> Contribution to cover the Past Service cost, herein called the "Past Service Contribution",

with proper adjustments to reflect minimum Retirement Incomes.

2. Future Service Contributions. The Future Service Contributions shall be computed by the actuary for the Retirement Board. Thereupon the actuary shall certify to the Retirement Board his computation as to the Future Service Contributions, and such computation shall determine the Future Service Contributions payable by the Company.

3. Past Service Contributions. The actuary for the Retirement Board shall compute the total Past Service cost of the Plan on the basis of the present value of all Past Service Retirement Income which may become payable under the Plan. The Past Service cost shall thereafter be periodically adjusted by the actuary. The actuary shall certify to the Retirement Board his computation as to the Past Service Contributions, and such computation shall determine the Past Service Contributions payable by the Company.

It is contemplated that the Past Service cost and the increased cost by reason of any amendment after the effective date of the Plan for service prior to the date of said amendment shall be paid by contributions made periodically by the Company. The Company hopes and expects to complete such contributions, but such completion is not guaranteed, subject to the provisions of Section XV hereof.

4. Expenses. All expenses of the Plan shall be paid by the Company, except that investment expenses (including brokerage costs, transfer taxes, shipping expenses and charges of correspondent banks of the Trustee) and any taxes which may be levied against the Trust Fund shall be charged to the Trust Fund.

SECTION XI. ADMINISTRATION OF PLAN

The general administration of the Plan shall be placed in a Retirement Board of five members who shall be appointed from time to time by the Board of Directors to serve at the pleasure of the Board of Directors.

Any person appointed a member of the Retirement Board shall signify his acceptance by filing written acceptance with

the Board of Directors. Any member of the Retirement Board may resign by delivering his written resignation to the Board of Directors, and such resignation shall become effective at delivery or at any later date specified therein.

The members of the Retirement Board shall elect a Chairman from their number, and a Secretary who may be but need not be one of the members of the Retirement Board, and shall designate an actuary to act in actuarial matters relating to the Plan. They may appoint from their number such committees with such powers as they shall determine, may authorize one or more of their number or any agent to make any payment in their behalf, or to execute or deliver any instrument except that a requisition for funds from the Trustees shall be signed by two members of the Retirement Board, and may employ counsel and agents and such clerical, medical and accounting services as they may require in carrying out the provisions of the Plan.

The Retirement Board shall hold meetings upon such notice, at such place or places, and at such time or times as they may from time to time determine.

A majority of the members of the Retirement Board at the time in office shall constitute a quorum for the transaction of business. All resolutions or other actions taken by the Retirement Board at any meeting shall be by the vote of a majority of the Retirement Board at the time in office.

No member of the Retirement Board who is also an employee of the Company shall receive any compensation from the Plan for his services as such. No bond or other security need be required of any member in any jurisdiction.

Subject to the limitations of the Plan, the Retirement Board from time to time shall establish rules for the administration of the Plan and the transaction of its business. The determination of the Retirement Board as to any question arising under the Plan shall be conclusive.

The Retirement Board shall adopt from time to time standards for use in all actuarial calculations required in connection with the Plan, and shall establish the rates of contribution on

account of the Plan as provided in Section X. As an aid to the Retirement Board in adopting tables and in fixing the rates of contribution payable under the Plan, the actuary designated by the Retirement Board shall make annual actuarial valuations with respect to the operation and administration of the Plan, and shall certify to the Retirement Board the tables and rates of contribution which he would recommend for use by the Retirement Board.

The Retirement Board shall maintain accounts showing the fiscal transactions of the Plan, and shall keep in convenient form such data as may be necessary for actuarial valuations with respect to the operation and administration of the Plan. The Retirement Board shall prepare annually a report showing in reasonable summary the financial condition of the Trust Fund and giving a brief account of the operation of the Plan for the past year, and any further information which the Board of Directors may require. Such report shall be submitted to the Board of Directors and shall be filed in the office of the Secretary of the Retirement Board.

The members of the Retirement Board and the Company and its officers and directors shall be entitled to rely upon all tables, valuations, certificates and reports furnished by any actuary designated by the Retirement Board, upon all certificates and reports made by any accountant selected or approved by the Board of Directors, and upon all opinions given by any legal counsel selected or approved by the Board of Directors, and the members of the Retirement Board and the Company and its officers and directors shall be fully protected in respect of any action taken or suffered by them in good faith in reliance upon any such actuary, accountant or counsel, and all action so taken or suffered shall be conclusive upon each of them and upon all employees, retired employees, former employees and Provisional Payees.

SECTION XII. MANAGEMENT OF FUNDS

1. Trust Fund. All assets of the Plan shall be held as a special trust for use in accordance with the Plan.

The funds of the Plan shall be held by Bankers Trust Company, New York, as Trustee, or by a successor trustee appointed from time to time by the Board of Directors, in trust, under a Trust Agreement dated as of July 1, 1944, as amended and supplemented. The Trust Agreement may from time to time be amended in the manner therein provided.

2. Disbursement of Funds. Subject to the provisions of the Trust Agreement the Retirement Board shall determine the manner in which the funds of the Plan shall be disbursed pursuant to the Plan, including the form of voucher or warrant to be used in making disbursements and the due qualification of persons authorized to approve and sign the same. The responsibility for the retention and investment of the Trust Fund shall lie with the Trustee and not with the Retirement Board.

3. Rights in Trust Fund. Under no circumstances shall amounts of money or other things of value contributed by the Company to the Plan, or any part of the corpus or income of the fund held by the Trustee under the Plan, be recoverable by the Company from the Trustee or from any employee, retired employee or Provisional Payee, or be used for, or diverted to, purposes other than for the exclusive benefit of the employees, retired employees and Provisional Payees covered hereunder; *provided, however,* that, if after satisfaction of all liabilities of the trust with respect to employees, retired employees and Provisional Payees under the Plan, there is any balance remaining, the Trustee shall return such balance to the Company.

SECTION XIII. TERMINATION OF THE PLAN

1. Subject to the provisions of Section XV hereof the Plan may be *terminated* at any time by action of the Board of Directors of the Company. Upon such termination or upon complete discontinuance of contributions under the Plan, the Trust Fund then held by the Trustee shall be used and applied for the benefit of employees of the Company who have been retired under the Plan, employees of the Company who at the date of

the termination of the Plan are included in the Plan, former employees who at the date of the termination of their employment had at least 20 years of service or had at least 15 years of service and attained the age of 50 as described in the first paragraph of Section VII and former employees who have transferred to an affiliated or associated company in accordance with subsection 5 of Section III and are still in the employ of or receiving a retirement income from such company (including their Provisional Payees, if any) in the following order:

First: For the benefit of such retired employees and such employees and former employees who have reached Normal Retirement Date, upon the basis of their Retirement Incomes, and

Second: As to any balance remaining, for the benefit of all such employees and former employees who are not provided for pursuant to paragraph First of this Section, upon the basis of their Accrued Retirement Incomes at the date of termination of the Plan,

in amounts as to each group in the order stated proportionate to, but not in excess of, the actuarially determined present values at the date of termination of the Plan of their respective Retirement Incomes and Accrued Retirement Incomes. Provision pursuant to either of the foregoing paragraphs of this Section may be made, in the discretion of the Retirement Board, by the purchase of annuities, or by continuing the Trust Fund in existence, and making provision therefrom of Retirement Incomes, or by immediate distribution from the Trust Fund. If after satisfaction of all liabilities of the Trust with respect to employees, retired employees and Provisional Payees under the Plan there is any balance remaining, the Trustee shall return such balance to the Company.

2. Notwithstanding any other provisions in this Plan to the contrary (other than subsections 4 and 5 of this Section XIII) the benefits for the 25 highest paid employees as of January 1, 1966, including any such employees who were not included in the Plan at that time but who later were included but excluding any employee whose annual benefits provided by employer contributions prior to that date and during the ensuing ten years, based on his rate of compensation on that date, could not exceed $1,500, will be subject to the conditions set forth in subsection 3 hereof.

3. If the Plan is terminated or the full current costs thereof have not been met at any time within 10 years after January 1, 1966, the benefits which any individual employee referred to in subsection 2 above may thereafter receive until the full current costs of the Plan have been met (unless he shall be entitled to greater benefits in accordance with the provisions of subsections 4 and 5 of this Section XIII) shall be limited to the benefits provided by employer contributions not exceeding the largest of the following three amounts:

(a) $20,000;

(b) The employer contributions (or funds attributable thereto) which would have been applied to provide benefits for such employee if the Plan had been continued without the amendment effective on January 1, 1966; and

(c) The sum of (a) the employer contributions (or funds attributable thereto) which would have been applied to provide benefits for the employee under the Plan (without the amendment effective on January 1, 1966) if it had been terminated on December 31, 1965, and (b) an amount computed by multiplying the number of years for which the full current costs of the Plan after December 31, 1965, are met by (A) 20% of the average regular annual compensation of such employee during the last 5 years of his service with the Company (if less than 5 years, then during such lesser period of service) immediately preceding (i) the date of termination of the Plan or failure to meet the full current costs thereof, or (ii) if earlier, the date of his termination of employment with the Company or his retirement under the Plan, or (B) $10,000, whichever is less.

4. Notwithstanding any other provisions in this Plan to the contrary, the benefits for the 25 highest paid employees of the Company as of January 1, 1971, including any such employees who are not included in the Plan at that time but who later are included but excluding any employee whose annual benefits provided by employer contributions prior to that date and during the ensuing 10 years, based on his rate of compensation on that date, could not exceed $1,500, will be subject to the conditions set forth in subsection 5 hereof.

5. If the Plan is terminated or the full current costs thereof have not been met at any time within 10 years after January 1, 1971, the benefits which any individual employee referred to in subsection 4 above may thereafter receive until the full current costs of the Plan have been met shall be limited to the benefits provided by employer contributions not exceeding the largest of the following three amounts:

(a) $20,000;

(b) The employer contributions (or funds attributable thereto) which would have been applied to provide benefits for such employee if the Plan had been continued without the amendment effective on January 1, 1971; and

(c) The sum of (a) the employer contributions (or funds attributable thereto) which would have been applied to provide benefits for the employee under the Plan (without the amendment effective on January 1, 1971) if it had been terminated on December 31, 1970, and (b) an amount computed by multiplying the number of years for which the full current costs of the Plan after December 31, 1970, are met by (A) 20% of the average regular annual compensation of such employee during the last 5 years of his service with the Company (if less than 5 years, then during such lesser period of service) immediately preceding (i) the date of termination of the Plan or failure to meet the full current costs thereof, or (ii) if earlier, the date of his termination of employment with

the Company or his retirement under the Plan, or (B) $10,000, whichever is less.

6. The term "full current costs" as used in subsections 3 and 5 of this Section XIII shall have the meaning ascribed to it in Income Tax Regulations Section 1.401-4(b) (2) (vi) presently in effect or as amended from time to time.

7. The limitations contained in subsections 2, 3, 4 and 5 of this Section XIII shall restrict neither (i) the current payment of full Retirement Income prior to the termination of the Plan (or a failure to meet full current costs) nor (ii) the payment of full Retirement Income to an employee's Provisional Payee at any time if such payment shall have commenced prior to the termination of the Plan (or a failure to meet full current costs).

8. Any funds released by operation of subsections 2, 3, 4 or 5 of this Section XIII shall become a part of the assets available for allocation under subsection 1 of this Section XIII among employees whose benefits are not restricted by the provisions of said subsections 2, 3, 4 and 5.

9. Subsections 2, 3, 4 and 5 of this Section XIII are included in the Plan to conform to the requirements of Income Tax Regulations Section 1.401-4(c) and shall cease to be effective at such time as the provisions of such Section of the Regulations as amended from time to time or any substitute therefor are no longer effective or applicable.

SECTION XIV. AMENDMENTS

Subject to the provisions of Section XV hereof, the Plan may be amended or modified at any time by the Board of Directors, *provided, however,* that, in no event, at any time prior to the satisfaction of all liabilities of the trust with respect to employees and retired employees and Provisional Payees under the Plan, shall any part of the corpus or income of the trust be used for, or diverted to, purposes other than for the exclusive benefit of employees or retired employees or Provisional Payees under the Plan; *and provided further* that no amendment or modification which will substantially increase the cost of the Plan

will be made by the Board of Directors without approval, at a meeting of the stockholders duly called for that purpose, by the vote of a majority of the stock present and entitled to vote at such meeting.

Such amendments and modifications (without limiting the generality of the foregoing) may, among other things, make any changes in the Plan which may become appropriate if, for any reason, the Company should in the future find it necessary or desirable not to complete payment of the Past Service costs of the Plan in the manner and within the period now contemplated or should find it necessary or desirable to reduce the amounts of Future Service Contributions to be paid by the Company after such amendment or modification. Such amendments and modifications may also (without limiting the generality of the foregoing), make any changes necessary or desirable to make the costs of the Plan eligible for tax deduction or to make the income of the Trust Fund exempt from taxation or to bring the Plan into conformity or compliance with governmental regulations.

SECTION XV. SPECIAL PROVISIONS

The Company intends that the Plan (including the trust forming a part thereof) shall be a pension plan of an employer for the exclusive benefit of his employees or their beneficiaries, as provided for in Section 401 of the Internal Revenue Code of 1954, as amended, and as may be provided for in any similar provisions of subsequent revenue laws, and that the trust shall qualify as an Employees' Trust under said Section 401 of the Internal Revenue Code which shall be exempt under Section 501(a) and any similar provisions of subsequent revenue laws, as a trust forming part of such a Plan.

Notwithstanding the provisions of Sections V, XIII and XIV, the Plan as amended as of January 1, 1971, shall not be subject to termination or amendment prior to January 1, 1976, except that the continuance of the Plan is conditioned upon the continued allowability in full to the Company as deductions for

Federal Income Tax purposes of the costs of the Plan and the continued tax-exempt status of the income of the Trust Fund and such Plan shall be subject to any changes necessary or desirable to make such costs of the Plan eligible for tax deductions or to make the income of the Trust Fund exempt from taxation or to bring the Plan into conformity or compliance with governmental regulations or, in accordance with the right reserved to the Company in the last paragraph of subsection 2 of Section V, to substitute in paragraphs (a) and (b) of subsection 2 of Section V a larger amount in place of $9,000, or to include in the Plan, if and to the extent and in the manner the Company so desires, any employees of the Company who were employees of properties acquired by the Company by purchase, consolidation, merger or otherwise on the same terms as if they had been employed by the Company.

Supreme Court, U. S.
FILED
FEB 24 1977
MICHAEL RODAK, JR., CLERK

APPENDIX

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-451

ALABAMA POWER COMPANY,
Petitioner,

—v.—

RAYMOND E. DAVIS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 28, 1976
CERTIORARI GRANTED JANUARY 10, 1977

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL DOCKET

BASIS: To require defendant to comply with provisions of Military Selective Service Act, 50 U.S.C., App. 459

TITLE OF CASE	ATTORNEYS
RAYMOND E. DAVIS	For plaintiff: Wayman G. Sherrer, U.S. Atty; Henry I. Frohsin, Asst. U.S. Atty Federal Courthouse, Birmingham, AL 35203
vs.	
ALABAMA POWER COMPANY Birmingham, Alabama	For defendant: H. Hampton Boles — Balch, Bingham, Baker, Hawthorne, Williams & Ward, P. O. Box 306, Birmingham, Alabama 35201

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 5 mailed	Clerk	15.00	Nov. 26	Ck-Balch, Bingham, Baker		
J.S. 6 mailed	Marshall	3.24				
Basis of Action:	Docket fee	20.00		Rec. #16721	5.00	
	Witness fees		Nov. 27	Cr. 100869		5.00
Action arose at:	Depositions					
	Court costs	38.24				

DATE	PROCEEDINGS
1972	
Dec. 20	Complaint filed
Dec. 20	Summons and complaint issued — del. to U. S. Marshal for service
1973	
Jan. 8	Summons and complaint returned, executed on 12-28-72 on Mr. Joseph M. Farley and filed
Jan. 30	Answer of defendant to the complaint, filed — copy served by counsel
June 20	Amended answer of defendant to the complaint filed — copy served by counsel
July 30	Motion of defendant to amend its answer to set forth a "Seventh Defense", filed — cs Order thereon dated August 1, 1973, giving defendant leave to amend answer (Guin) —
Aug. 13	Amendment to answer filed in open court — allowed
Aug. 13	Exhibits (2) to stipulation filed in open court (Pension Plan & Veteran's Re-employment Rights)
Aug. 13	Agreed statement of facts filed in open court
Aug. 13	On trial before the Hon. J. Foy Guin, Jr. without a Jury — plaintiff's testimony — defendants rest on stipulation — argument of counsel — taken under advisement
Aug. 13	Clerk's Court Minutes entering Judgment on decision by the Court, that this matter is taken under advisement, filed and entered (Jerry Minatra, Court Reporter)
Dec. 28	Order Judgment entering judgment in favor of plaintiff and against defendant in the matter of establishing the plaintiff's seniority status, entitling said plaintiff to an appropriate award to compensate him for the loss of $17.11 per month

DATE	PROCEEDINGS
	due from past pension payments, and to a mandatory injunction requiring defendant to increase the plaintiff's present pension payment from $198.95 per month to $216.06 per month, as to all future installments of said pension; further ordering that defendant pay directly to the attorneys of record for plaintiff the proceeds of the judgment and the costs recovered herein by plaintiff, and upon receipt thereof the attorneys of record for plaintiff will satisfy the said judgment upon the records of this court, filed and entered (Guin) — cm
1974	
Jan. 7	Motion of defendant for a new trial filed — cs
Sep. 11	Memorandum Opinion of the Hon. J. Foy Guin, Jr. finding that plaintiff is entitled to have the 2 year 6 month and 20 day period he spent in the service of his country computed as "accredited service" under the defendant's retirement pension plan and thereby entitling plaintiff to an increase in his retirement pension benefits of $17.11 per month; additionally plaintiff is entitled to an appropriate award to compensate him for loss of this amount in past pension payments and to a mandatory injunction requiring defendant to increase plaintiff's present pension payments from $198.95 per month to $216.06 per month, as to all future installments of his pension, and plaintiff will submit an appropriate order to the court for signature within 30 days — cm
Oct. 1	Order Judgment permanently enjoining and restraining defendant from violating the provisions of the Military Selective Service Act with respect to the rights of plaintiff; defendant shall not exclude the exclusion of any of plaintiff's period of

DATE	PROCEEDINGS
	absence due to military service from approximately March 18, 1943, to October 8, 1945 for the purpose of determining plaintiff's years of "Accredited Service" under the Pension Plan of Alabama Power Company; defendant shall immediately increase the amount of plaintiff's monthly pension payments from $198.95 to $216.06 and afford him all the benefits and entitlements provided by any future changes in the plan; defendant shall not continue to withhold from plaintiff his past pension underpayments in the amount of $684.40 together with interest thereon in the amount of $66.73 and taxing costs against defendant, filed and entered (Guin) cm
Oct. 23	Motion of defendant for leave to amend motion for new trial filed — order thereon granting (Guin) cm
Oct. 23	Amended motion of defendant for a new trial filed — cs — order thereon overruling dated October 31, 1974 (Guin) cm
Nov. 21	Costs taxed by the Clerk — bill mailed attorneys for defendant
Nov. 26	Notice of appeal by defendant from final judgment entered in this action and from the Order of the Court overruling defendant's amended motion for new trial entered in this action on October 31, 1974, filed — ccm
Nov. 26	Appeal Bond ($250.00) filed
Dec. 6	Designation of contents of record on appeal by defendant-appellant filed — cs
Dec. 30	Transcript of proceedings before the Hon. J. Foy Guin on August 13, 1974 — filed

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

RAYMOND E. DAVIS, Plaintiff	)	
vs.	)	CIVIL ACTION
ALABAMA POWER COMPANY	)	NO. 72-1123
Birmingham, Alabama	)	Filed December 20, 1972
Defendant	)	

COMPLAINT

Comes now the plaintiff, Raymond E. Davis, by Wayman G. Sherrer, United States Attorney for the Northern District of Alabama, and Henry I. Frohsin, Assistant United States Attorney for the said District, and for cause of action alleges:

I. That this is an action under the Military Selective Service Act, (formerly the Universal Military Training and Service Act) 50 U.S.C., App. 459, and the jurisdiction of this Court is based thereon.

II. The plaintiff resides at Okeechobee, Florida, outside the State of Alabama.

III. Defendant is a corporation and maintains a place of business at 600 North, 18th Street, Birmingham, Jefferson County, Alabama within the jurisdiction of this Court, where it is engaged in an electric utility business.

IV. Plaintiff was first employed by the defendant on August 16, 1936, in a position other than temporary and continued in such employ until approximately March 18, 1943, when he left such position for the purpose of performing military training and service; and was, on or about March 20, 1943, inducted into the Armed Forces of the United States.

V. In October 1945, plaintiff satisfactorily completed a period of training and service in the Armed Forces and received a certificate evidencing his satisfactory completion of

such training and service. On or about October 8, 1945, plaintiff was reemployed by defendant, and he continued in that employment until on or about June 1, 1971.

VI. In 1944, the defendant established a retirement annuity plan for defendant's employees which has been fully paid by the defendant. Payments to employees pursuant to the said plan are substantially based on the employees' years of employment by the defendant.

VII. The defendant has excluded and caused the exclusion of the aforesaid period of time, during which plaintiff had left his aforesaid employment to perform military service and training, from the computation, credit and payment of amounts to plaintiff under the aforesaid plan, all in violation of plaintiff's statutory rights under the aforesaid Act.

VIII. Because of Defendant's unlawful conduct, as aforesaid, plaintiff has been and is being deprived of status, seniority and pay which he would have enjoyed if he had continued in his aforesaid employment continuously from the time of his entering the Armed Forces until the time of his restoration of employment, as aforesaid.

WHEREFORE, plaintiff respectfully prays that this Court require the defendant to comply with the provisions of the Military Selective Service Act (formerly the Universal Military Training and Service Act), 50 U.S.C., App. 459, and further require the defendant to compensate the plaintiff for his loss of wages and benefits suffered by reason of the defendant's unlawful action.

/s/ WAYMAN G. SHERRER

WAYMAN G. SHERRER
United States Attorney

/s/ HENRY I. FROHSIN

HENRY I. FROHSIN
Assistant United States Attorney

Counsel for plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

RAYMOND E. DAVIS, Plaintiff,	)	
v.	)	CIVIL ACTION NO. CA 72-1123
ALABAMA POWER COMPANY,	)	Filed: January 30, 1973
Defendant.	)	

ANSWER

Comes the defendant, Alabama Power Company, a corporation, and in answer to the complaint of the plaintiff herein avers as follows:

FIRST DEFENSE

I

Defendant admits the allegations of Paragraphs I, II, III and IV of the complaint.

II

Defendant admits that, as alleged in Paragraph V of the complaint, plaintiff returned to work with defendant on or about October 8, 1945, after being on military leave of absence and that plaintiff continued such employment with defendant until on or about June 1, 1971, when plaintiff retired from employment with defendant. Defendant is without knowledge or information sufficient to form a belief as to the truth of the other allegations contained in Paragraph V.

III

Defendant admits that, as alleged in Paragraph VI of the complaint, the Pension Plan of defendant was established

and became effective on July 1, 1944, and that all contributions to the Pension Plan Trust Fund are and at all times since the effective date of the Pension Plan have been made by defendant and that no contribution has been made or required of the plaintiff or any other employee of defendant. Defendant denies all other allegations of Paragraph VI.

IV

As to the allegations of Paragraph VII of the complaint, defendant admits that the time which elapsed while plaintiff was on military leave of absence did not constitute "Accredited Service" for purposes of computing plaintiff's retirement income under the Pension Plan of defendant. Defendant denies that such constitutes a violation of plaintiff's rights under the Military Selective Service Act (50 U.S.C.A. App. §459).

V

Defendant denies each and every allegation of Paragraph VIII of the complaint.

VI

Defendant denies that plaintiff is entitled to any relief whatsoever.

SECOND DEFENSE

The complaint fails to state a claim against defendant upon which relief can be granted.

THIRD DEFENSE

The complaint fails to state a claim against the defendant upon which relief can be granted, in that the complaint shows that plaintiff's cause of action, if any, arose in the State of Alabama and accrued more than six (6) years prior to the commencement of this action and is, therefore, barred by the

six-year statute of limitations set forth in 1940 Code of Alabama (Recomp. 1958), Title 7, Section 21.

FOURTH DEFENSE

The United States statute upon which plaintiff's claim is based (50 U.S.C.A. App. §459), does not require that leaves of absence from employment for military service purposes be treated as "Accredited Service" for computation of benefits under the Pension Plan of defendant, but rather such statute requires that plaintiff be allowed to participate in such Pension Plan offered by defendant "pursuant to established rules and practices relating to employees on furlough or leave of absence. . . ." Defendant avers that defendant had no Pension Plan in effect when plaintiff entered the military service in 1943, but that the Pension Plan of defendant became effective on July 1, 1944. Prior to the amendment of January 1, 1966, to the Pension Plan of defendant, leaves of absence without regular pay for all purposes including military service were treated in the same manner by said Pension Plan, in that no such leave of absence constituted "Accredited Service" for purposes of computing retirement income. Among other things, said amendment of January 1, 1966, modified said Pension Plan so as to allow veterans of military service to substitute "early-age service" (service with defendant prior to an employee's 25th birthday), less one qualifying year as "Accredited Service" for certain designated military service time. Defendant avers that this particular provision allowing substitution of "early-age service" as "Accredited Service" does not affect plaintiff in that plaintiff had no service with defendant prior to plaintiff attaining 25 years of age. Defendant avers that since plaintiff retired on June 1, 1971, defendant has paid to plaintiff retirement income in the amounts and in all other respects in accordance with the provisions of the Pension Plan of defendant as amended to and including the amendment of January 1, 1971, and in full compliance with the Military Selective Service Act (50 U.S.C.A. App. §459).

FIFTH DEFENSE

If defendant is mistaken as to the application of the statute of limitations as set forth in the "Third Defense" as stated above, then, in the alternative, the complaint fails to state a claim against the defendant upon which relief can be granted in that the alleged claim of plaintiff is barred by laches and delay of plaintiff in bringing this action to the prejudice of the defendant. Defendant avers that the claim of plaintiff, if any, arose and suit could have been initiated thereon by plaintiff immediately upon plaintiff's return from military leave of absence in 1945; and that plaintiff's long delay in initiating this claim has severely prejudiced defendant in that defendant has not funded defendant's Pension Plan Trust Fund for payment of plaintiff's claim or like claims so as to remain on an actuarially sound basis. Defendant further avers that had plaintiff timely prosecuted the alleged action in this cause and had the courts upheld said claim, defendant, then, would have been in a better position to make appropriate and necessary adjustments to defendant's contributions to the Pension Plan Trust Fund to account for the payment of such claim.

SIXTH DEFENSE

If the defendant is mistaken in the "Fourth Defense" as stated above, and the United States statute upon which plaintiff's claim is based requires the defendant to give plaintiff accredited service for purposes of computing plaintiff's retirement income under defendant's Pension Plan for the time when the plaintiff was on leave of absence for military service purposes and rendered no services or labor to defendant, then defendant avers that such United States statute is unconstitutional in that it violates the constitutional rights of defendant including depriving defendant of its property without due process of law and taking defendant's private property without just compensation. In addition, defendant avers that such construction of such United States statute

would require that defendant discriminate in favor of plaintiff against all other employees of defendant.

BALCH, BINGHAM, BAKER,
HAWTHORNE, WILLIAMS & WARD

By /s/ H. HAMPTON BOLES

Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

RAYMOND E. DAVIS, Plaintiff,	)	
v.	)	CIVIL ACTION
ALABAMA POWER COMPANY,	)	NO. CA 72-1123
Defendant.	)	Filed: June 20, 1973

AMENDED ANSWER

Comes the defendant, Alabama Power Company, a corporation, and amends the "SIXTH DEFENSE" to its answer to the complaint of the plaintiff herein to read as follows:

"SIXTH DEFENSE

If the defendant is mistaken in the "Fourth Defense" as stated above, and the United States statute upon which plaintiff's claim is based requires the defendant to give plaintiff accredited service for purposes of computing plaintiff's retirement income under defendant's Pension Plan for the time when the plaintiff was on leave of absence for military service purposes and rendered no services or labor to defendant, then defendant avers that such United States statute is unconstitutional in that it violates the constitutional rights of defendant including depriving defendant of its property without due process of law, taking defendant's private property without just compensation, discriminating against defendant as an employer, and denying defendant equal protection of the law. In addition, defendant avers that such construction of such United States statute would require that defendant discriminate in favor of plaintiff against all other employees of defendant."

Defendant reasserts each and all the defenses and answers contained in its original answer with like effect as if herein fully set forth except as relates to the "SIXTH DEFENSE" herein amended.

BALCH, BINGHAM, BAKER,
HAWTHORNE, WILLIAMS & WARD

By /s/ H. HAMPTON BOLES

Attorneys for Defendant
Alabama Power Company

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

RAYMOND E. DAVIS, Plaintiff,	)	
v.	)	CIVIL ACTION
ALABAMA POWER COMPANY,	)	NO. 72-1123-S
Defendant.	)	Filed: August 13, 1973

AMENDED ANSWER

Comes the defendant, Alabama Power Company, a corporation, and amends its answer as previously amended to set forth a "SEVENTH DEFENSE" to its answer to the complaint of the plaintiff herein to read as follows:

"SEVENTH DEFENSE

The complaint fails to state a claim against the defendant upon which relief can be granted, in that the complaint shows that plaintiff's cause of action, if any, arose in the State of Alabama and accrued more than one (1) year prior to the commencement of this action and is, therefore, barred by the one-year statute of limitations set forth in 1940 Code of Alabama (Recomp. 1958), Title 7, Section 26."

Defendant reasserts each and all the defenses and answers contained in its original answer, as amended, with like effect as if herein fully set forth.

BALCH, BINGHAM, BAKER,
HAWTHORNE, WILLIAMS & WARD

By /s/ H. HAMPTON BOLES

Attorneys for Defendant,
Alabama Power Company

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

RAYMOND E. DAVIS, Plaintiff,	)	
v.	)	CIVIL ACTION
ALABAMA POWER COMPANY,	)	NO. 72-1123
Defendant.	)	Filed: August 13, 1973

AGREED STATEMENT OF FACTS

This is a civil non-jury proceeding brought by plaintiff, R. E. Davis, against defendant, Alabama Power Company, to compel defendant to grant plaintiff accredited service for purposes of computing retirement income under defendant's Pension Plan for the period of time plaintiff was on military leave of absence from employment with defendant. Plaintiff's claim is asserted under the Military Selective Service Act, 50 U.S.C. App. 459.

The plaintiff was first employed by the defendant on August 16, 1936, in a position other than temporary and continued in such employ until March 18, 1943, when he left such position for the purpose of performing military training and service; and was, on March 20, 1943, inducted into the Armed Forces of the United States. On October 1, 1945, the plaintiff honorably completed a period of training and service in the Armed Forces and was reinstated by the defendant on October 8, 1945, and continued that employment until June 1, 1971, at which time plaintiff retired from employment with defendant.

During the period of plaintiff's absence in the Armed Forces, the defendant experienced no general layoffs which would have affected plaintiff's employment with defendant.

On July 1, 1944, the defendant established a Pension Plan for defendant's employees. A copy of the Pension Plan for

Employees of Alabama Power Company, as Amended to and including Amendment of January 1, 1971, is marked Exhibit "A", attached hereto and made a part hereof as if set out in full. The parties agree that the copy of the Pension Plan is authentic.

Defendant's Pension Plan has been amended from time to time and last amended by Amendment of January 1, 1971, which amendment did not change the provisions relating to periods of leave of absence without regular pay and periods of services with the Armed Forces. With respect to treatment of military service, except as provided by the Amendment of January 1, 1966, which is not applicable to plaintiff, the Pension Plan has at all times provided that all periods of "leaves of absence without regular pay" and of service in the Armed Forces do not constitute accredited service for purposes of the Pension Plan (see Sections II.2 and III of the Pension Plan). The Amendment of January 1, 1966, provided that the periods of military service specified in Section III(3)(a) [pp. 7-8 of the attached copy of defendant's Pension Plan] constitute accredited service under the circumstances stated in such Section III(3)(a). These circumstances include allowing veterans to substitute "early-age service" (service with defendant prior to an employee's 25th birthday less one qualifying year) as "Accredited Service" for certain designated military service time including the period of plaintiff's military service. However, this particular provision allowing substitution of "early-age service" as "Accredited Service" did not affect plaintiff in that plaintiff had no "early-age" service with defendant, i.e., none prior to plaintiff attaining 25 years of age. Defendant has excluded all periods of leaves of absence without regular pay and periods of military service other than as provided in Section III(3)(a) of the Pension Plan from its computation of accredited service under the Plan for all its employees.

All contributions to the "Pension Plan Trust Fund" have been made by defendant and no contributions are made by employees of defendant. The fund is established under a

Trust Agreement by contributions made by the Company and from which the amounts of Retirement Income are paid. The amount of the contributions of defendant to the Pension Plan Trust Fund is determined by the defendant or its agents annually on an actuarial basis taking into account factors including, among others, the number of full-time regular employees of defendant who are covered by the Pension Plan, their accredited service, and their earnings. The Pension Plan Trust Fund is not funded by the defendant to pay retirement income based upon the inclusion of military service time as Accredited Service other than as now provided by Section III of the Plan.

The Pension Plan of defendant has been the subject of negotiations between defendant and various Local Unions of International Brotherhood of Electrical Workers since 1950, including Local No. 841 of which plaintiff was a member at the time of his retirement. The Pension Plan has been a part of the collective bargaining agreement between defendant and the various Local Unions of International Brotherhood of Electrical Workers since July, 1961, including Local No. 841.

All full-time regular employees of defendant who have completed one year of service with defendant and attained the age of twenty-five (25) years are included in the Pension Plan. Employees other than full-time regular employees, such as part-time employees and emergency employees, are not included in the Pension Plan and are not eligible to accrue Accredited Service thereunder (see Sections II and III of the Plan). According to directives and practices of defendant, a full-time regular employee of defendant is an employee who is employed on a full-time basis for an indefinite period of time. The full-time regular work week of defendant consists of forty (40) hours per week and regular daily work consists of eight (8) scheduled hours of work per day. With respect to employees other than those exempted under the Fair Labor Standards Act, hours worked in excess of forty (40) hours per week require overtime com-

pensation. For purposes of defendant's Pension Plan, "earnings" do not include pay for overtime hours (see Pension Plan, Section V.7, p. 18).

Pursuant to collective bargaining agreements, employment policies and practices of defendant, exceptions to or off-time from the regular full-time work week are as follows:

(1) from two weeks to five weeks annual vacation, the length of such vacation depending upon the length of the employee's service;
(2) eight holidays per year;
(3) annual sick leave up to ten work days per year or accumulation of a maximum of thirty work days; and
(4) up to three work days as a result of death in the immediate family of an employee.

The periods of time referred to above and enumerated as (1) through (4), inclusive, are with full pay and constitute Accredited Service under defendant's Pension Plan. At defendant's discretion and depending on the circumstances presented, in some cases employees, deserving of such in the opinion of defendant, are allowed up to a maximum of nine (9) months extended sick leave with pay which time is considered by the Retirement Board as Accredited Service for purposes of the Pension Plan. The maximum of nine (9) months is allowed only where the employee has in excess of twenty years service with defendant and is considered deserving of such because of his employment record.

According to defendant's employment practices and policies, under no circumstances may an employee be off work without pay in excess of thirty (30) calendar days without such absence affecting his full-time employment status. The maximum thirty day period of time in which an employee may be off from work without pay is allowed by defendant only in cases of extended sickness. Brief, infrequent periods of absence without pay may be permitted by defendant for employee emergencies such as family sickness and transportation problems. Such periods of absence without pay do not

affect the employee's full-time employment status with defendant and constitute Accredited Service under defendant's Pension Plan. If for any reason, an employee is off from work without pay for more than thirty calendar days, the total unpaid absence is retroactively deducted from the employee's Accredited Service for purposes of the Pension Plan. The occasions where an employee is permitted time off without pay for extended sickness or personal emergencies under this practice and policy of defendant are infrequent and are not allowed by defendant to be abused by employees. Defendant's employment practices and policies do not permit, for example, an employee returning to work after a period of such unpaid sick leave and then qualifying or obtaining a second or successive period of unpaid sick leave to avoid the maximum thirty calendar day limitation.

The plaintiff's date of birth is May 2, 1910. The plaintiff's "Accredited Service" under the Plan began as of August 16, 1937, one year after his employment date. The plaintiff accrued "accredited service" under the Pension Plan from such date until June 1, 1971, at which time he retired, except for the 2-year, 6-month and 20-day period of military service [March 18, 1943, to October 8, 1945], and except for the 4-month, 22-day period of time plaintiff participated in a union strike [August 16, 1966, through January 8, 1967]. Plaintiff presently receives $198.95 per month retirement income under defendant's Pension Plan. Had plaintiff received accredited service for the period of military service, he would be entitled to $216.06 per month; a difference of $17.11 per month.

Plaintiff's status under the defendant's Pension Plan was reviewed with plaintiff by defendant on September 11, 1967, at which time plaintiff was advised by defendant that defendant's Pension Plan did not afford Accredited Service for the time plaintiff was in the military service.

Plaintiff contacted the appropriate office of the U.S. Department of Labor on July 6, 1971 to assist him in pursuing

this claim and to request that suit be brought by the U. S. Attorney. Suit was filed by the U. S. Attorney on behalf of plaintiff on December 20, 1972.

For the Defendant:	For the Plaintiff:
Balch, Bingham, Baker, Hawthorne, Williams & Ward Attorneys	Wayman G. Sherrer United States Attorney
By: /s/ H. Hampton Boles H. Hampton Boles	By: /s/ Henry I. Frohsin Henry I. Frohsin Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

RAYMOND E. DAVIS, Plaintiff,	)	
vs.	)	CIVIL ACTION
ALABAMA POWER COMPANY, Defendant.	)	NO. 72-1123-S

ORDER

In conformity with and pursuant to the Memorandum Opinion of the Court contemporaneously filed herewith, it is

ORDERED, ADJUDGED and DECREED that judgment be entered in favor of the plaintiff and against the defendant in the matter of establishing the plaintiff's seniority status, entitling said plaintiff to an appropriate award to compensate him for the loss of $17.11 per month due from past pension payments, and to a mandatory injunction requiring defendant to increase the plaintiff's present pension payment from $198.95 per month to $216.06 per month, as to all future installments of said pension.

It is further ORDERED, ADJUDGED and DECREED by the Court that the defendant pay directly to the attorneys of record for the plaintiff the proceeds of the judgment and the costs recovered herein by the plaintiff, and upon receipt thereof the attorneys of record for the plaintiff will satisfy the said judgment upon the records of this Court.

Done this 28th day of December, 1973.

/s/ J. Foy Guin, Jr.

UNITED STATES DISTRICT JUDGE
J. Foy Guin, Jr.

Raymond E. DAVIS, Plaintiff,
v.
ALABAMA POWER COMPANY,
Defendant.

Civ. A. No. 72-G-1123-S.

United States District Court,
N. D. Alabama, S. D.
Sept. 11, 1974.

MEMORANDUM OPINION

GUIN, District Judge.

The plaintiff, Raymond E. Davis, in this non-jury proceeding, is a World War II armed forces veteran who temporarily left his employment with the defendant, Alabama Power Company, to serve his country during war time. This plaintiff asserts, pursuant to the Military Selective Service Act,[1] that the period of time spent in the service of his

1. 50 U.S.C.App. § 459 (§ 8 of original act) in pertinent part provides:

(b) Reemployment rights

In the case of any such person who, in order to perform such training and service, has left or leaves a position (other than a temporary position) in the employ of any employer and who (1) receives such certificate, and (2) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

* * * * *

(B) if such position was in the employ of a private employer, such person shall—

(i) if still qualified to perform the duties of such position, be restored by such employer or his successor in interest to such position or to a position of like seniority, status, and pay; or

(ii) if not qualified to perform the duties of such position by reason of disability sustained during such service but qualified to perform the duties of any other position in the employ of such employer or his successor in interest, be restored by such employer or his successor in interest to such other position the duties of which he is qualified to perform as will provide him like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in his case,

unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

* * * * *

(c) Service considered as furlough or leave of absence

(1) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) [of this section] shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

(2 It is declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) [of this section] should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.

(3) Any person who holds a position described in paragraph (A) or (B) of subsection (b) [of this section] shall not be denied retention in employment or any promotion or other incident or advantage of employment because of any obligation as a member of a reserve component of the Armed Forces of the United States.

country should be held, by this court, to be "accredited service" for purposes of computing retirement pension benefits under the defendant's retirement program.

The defendant, Alabama Power Company, on the other hand, ardently maintains that: (1) because the company's pension policy denies all other employees, who were on furlough or leave of absence without regular pay, the right to accredited service, that it would be contrary to the company's overall policy to bestow accredited service to those called to serve their country where no actual work had been done for the company during such period of service; (2) it would be unconstitutional to require the defendant to grant the plaintiff increased retirement income based upon a period of time in which the plaintiff performed no work; (3) the

plaintiff's claim for relief is barred by the one-year Alabama statute of limitations, Ala. Code (Recomp. 1958), tit. 7, § 26, or by the six-year Alabama statute of limitations, Ala. Code (Recomp. 1958), tit. 7, § 21, or by the equitable doctrine of laches.

STATEMENT OF FACTS

The pertinent facts, which were stipulated by the parties and the uncontradicted testimony of the one witness, are as follows:

The plaintiff commenced his employment with the defendant on August 16, 1937; after having worked for the defendant for a period of seven years, the plaintiff, on March 18, 1943, temporarily left that employment to serve the cause of his country in the military. The plaintiff honorably served our nation and was discharged on October 1, 1945. On October 8, 1945, the plaintiff was reinstated with the defendant and continued that employment until he retired on June 1, 1971. Thus, the time period involved in this suit is the two-year, six-month and 20-day period in which this World War II veteran plaintiff temporarily left the employment of the defendant to serve in the defense of his country. The plaintiff is presently receiving $198.95 per month under the defendant's retirement pension program; however, if this court determines that the Military Selective Service Act, 50 U.S.C. App. § 459, entitles the plaintiff to receive "accredited service" for his time in the service, plaintiff will be entitled to $216.06 per month; an increase per month of $17.11. If the plaintiff's seniority status is so determined, he will be entitled to an appropriate award to compensate him for the loss of this amount from past pension payments, and to a mandatory injunction requiring the defendant to increase his present pension payment from $198.85 per month to $216.06 per month, as to all future installments on his pension.

The defendant established its pension program for its employees on July 1, 1944, and the plan has been amended from

time to time pursuant to negotiations between the defendant and the various local unions of the International Brotherhood of Electrical Workers since 1950, including Local No. 841 of which the plaintiff was a member at the time of his retirement. The pension plan has been a part of collective bargaining agreements between the defendant and the various local unions of the International Brotherhood of Electrical Workers since July, 1961, including Local No. 841.

The pension plan provides that all full-time regular employees of the defendant who have completed one year of service with the defendant and have attained the age of 25 years are included in the pension plan. Employees other than full-time regular employees, such as part-time employees and emergency employees, are not included in the pension plan and are not eligible to accrue "accredited service." According to directives and practices of the defendant, a full-time regular employee of the defendant is an employee who is employed on a full-time basis for an indefinite period of time. A full-time regular work week of the defendant consists of 40 hours per week, and regular daily work consists of eight scheduled hours work per day. Furthermore, under the defendant's pension plan, in the computing of "accredited time" the pension plan makes immaterial the number of overtime hours or overtime days the employee may have worked during his career, as none of this actual work time is taken into account in computing "accredited service." "Accredited service" does include, pursuant to collective bargaining agreements and employment practices and policies of the defendant, the following:

(1) From two weeks to five weeks annual vacation, the length of such vacation depending upon the length of the employee's service;

(2) Eight holidays per year;

(3) Annual sick leave up to 10 work days per year, or accumulation of a maximum of 30 work days;

(4) Up to three work days as a result of death in the immediate family of an employee; and

(5) Up to a maximum of nine months extended sick leave with pay, or up to 12 months by reducing the pay per month to the equivalent of six months at full pay and six months at half pay. (Such extended sick leave is discretionary with defendant and is pro-rated downward for employees with less than 20 years of service with defendant.)[2]

With respect to the exclusion of military service by the defendant from its pension plan, except as provided by the amendment of January 1, 1966 (which is not applicable to the plaintiff) the defendant has excluded all periods of leave of absence without regular pay and periods of military service in the computation of "accredited service" for the purpose of the pension plan.[3]

2. Each of these inclusions involves time in which no work was performed.

3. Section II. 2. of the defendant's pension plan provides:

2. Persons in Military Service and Employees on Authorized Leave of Absence. Any person not already included in the Plan who leaves or has left the employ of the Company to enter the Armed Forces of the United States or is on authorized leave of absence without regular pay and who returns to the employ within a reasonable time after discharge from such service (which reasonable time shall not in any event be construed to be less than 90 days or such longer period as may be less than 90 days or such longer period as may be fixed by law) or at or before termination of his leave of absence, shall, upon such return, be included in the Plan if and when he has met the requirements of subsection 1 of this Section. *In determining continuity or immediacy of service referred to in such subsection, the period of such absence in the Armed Forces of the United States or on such authorized leave of absence without regular pay shall be deemed not to have existed* . . . (Emphasis added.)

Section III. 2. provides:

2. Crediting of Past Service. Past Service, if any, as defined in Section I, shall be credited to all employees included in the Plan (a) who were so included on July 1, 1944, (b) who were on the payroll on July 1, 1944 and subsequently were included in the Plan without lapse of employment since July 1, 1944, or (c) who were on authorized leave of absence without regular pay or in the Armed Forces on July 1, 1944 and were included in the Plan on or after their return to the employ of the Company as provided in Section II hereof. *Employees designated in (c) above shall not be credited with Past Service for the period of such leave of absence or service in the Armed Forces, except as provided in subsection 3(a) of this Section III.* No other employee included in the Plan shall be entitled to such Past Service. (Emphasis added.)

4. Section III of the plan does not apply to the plaintiff.

The plaintiff's status and benefits under the defendant's pension plan were reviewed with the plaintiff by the defendant on September 11, 1967, at which time the plaintiff was advised by the defendant that it would not include as a part of its computation of pension benefits the period of time he spent in the military service as "accredited service." The method of computation used to determine the plaintiff's retirement benefits is found in Section V.4(a) and (b) of the pension plan. This method is the so-called "minimum Retirement Income" method which takes into account two operating factors: (1) the employee's rate of earnings as of his retirement date; and (2) his years of "accredited service."

The amount of contributions to the pension plan trust fund is determined by the defendant or its agents annually on an actuarial basis, taking into account the factors which include: (1) the number of full-time regular employees who are covered by the plan; (2) their accredited service; and (3) their earnings. Further, the defendant maintains that the pension plan trust fund was not funded to pay retirement income based upon the inclusion of military service as accredited service other than as provided by Section III of the plan.[4]

CONCLUSIONS OF LAW

The legal issue before the court is simply whether 50 U.S.C.App. § 459(b) and (c) require this defendant employer to include the plaintiff's time spent in the military service in its computation of benefits under the defendant's retirement pension plan. More basically, this court must de-

termine whether the retirement benefits under the defendant's pension plan were perquisites of "seniority" or merely in the nature of "other benefits" under Section 9(c)(1) [50 U.S.C.App. § 459(c)(1)] of the act.[5] If the rights of the plaintiff, under the defendant's pension plan, are seniority rights, it is clear that the time he spent in the service of his country must be included in the computation of the amount of his pension payments. 50 U.S.C.App. § 459(b) and (c);[6] Accardi v. Pennsylvania R. Co., 383 U.S. 225, 86 S.Ct. 768, 15 L.Ed.2d 717 (1966).

The defendant, Alabama Power, contends that its pension plan is not a seniority benefit but rather a retirement program based on the amount of *work actually performed* for the company, and thus is an "other benefit" which is not subject to the Military Selective Service Act. The finding of this court thus rests upon whether or not this pension plan is based upon the actual amount of work performed for the defendant company, or whether this pension plan is simply a perquisite of "seniority."

5. If the retirement pension is to be considered as "other benefits," the stipulated facts in this case would mandate a holding for the defendant under § 459(c)(1), because that section allows the returning veteran "insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, . . ." The rules of the defendant company have at all material times denied rights in "insurance or other benefits," as distinguished from seniority rights to employees on furlough or leave of absence.

6. This is so because § 459(b) requires that upon return from military service the veteran must "be restored by such employer or his successor in interest to such position or to a position of like seniority, status, and pay; . . ." If the amount of this veteran's retirement pension is a matter of seniority, he could only be restored to "like seniority" if the years in service were included in the computation. This is especially true when the language of § 459(c) is considered, as follows: ". . . be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment."

SENIORITY RIGHTS

[1] This court takes note that because the act does not define the term "seniority," veterans have had to turn to the courts for a definition of seniority rights.[7] The courts have had to proceed, case by case, to delineate the concept of "seniority" within the spirit of the act, without a rigid classification of seniority rights by collective bargaining agreements or employer interpretation of what seniority rights should or should not consist of.

While collective bargaining contracts have been consulted by the Supreme Court, the rule devised by the Supreme Court in interpreting individual contracts once a benefit has been determined to be a perquisite of seniority has always been:

> This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need . . . And no practice of employers or agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act. Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275 at 285, 66 S.Ct. 1105 at 1111, 90 L.Ed. 1230 (1946).

The problem of the definition of "seniority" was addressed again by the Supreme Court in Accardi v. Pennsylvania R. Co.:

> The term "seniority" is nowhere defined in the Act . . . [it] . . . is not to be limited by a narrow, technical definition but must be given a meaning that is consonant with the intention of Congress as expressed in the 1940 act. That intention was to preserve for the returning

7. Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 66 S.Ct. 1105, 90 L.Ed. 1230 (1946): Oakley v. Louisville & N. R. Co., 338 U.S. 278, 70 S.Ct. 119, 94 L.Ed. 87 (1949); Diehl v. Lehigh Valley R. Co., 348 U.S. 960, 75 S.Ct. 521, 99 L.Ed. 749 (1955); Tilton v. Missouri P. R. Co., 376 U.S. 169. 84 S.Ct. 595. 11 L.Ed.2d 590 (1964); Accardi v. Pennsylvania R. Co., 383 U.S. 225, 86 S.Ct. 768. 15 L.Ed.2d 717 (1966).

> veterans the *rights and benefits* which would have automatically accrued to them had they remained in private employment rather than responding to the call of their country. 383 U.S. at 229, 230, 86 S.Ct. at 771. (Emphasis added.)

The defendant's pension plan makes immaterial the number of overtime hours, days, weeks, months or years which the employee may have worked during his career. None of this actual work time is taken into account in computing "accredited service."

After a thorough review of defendant's pension program, this court is of the considered opinion that this plaintiff was not treated as though he had been continuously employed. No provision has been made in the pension plan for computation of pension benefits based upon "units of work." In fact, the agreed facts show that the total time of employment is what is material in the computation, and not the actual amount of work performed during said total time of employment.

There can be no question that the computation is essentially based upon seniority, since it is based entirely upon time, and not at all upon the amount of work actually performed for the company. Time is the essence of seniority and that is what seniority computation is all about.

[2] The intention of Congress was to recognize the existence of seniority systems and seniority rights, and Congress sought to preserve the veteran's rights under those systems and to protect him against loss of seniority benefits by reason of his absence. In *Fishgold*, the Supreme Court observed:

> Thus he does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war. 328 U.S. at 284-285, 66 S.Ct. at 1111.

This "escalator" principle[8] was reaffirmed by the Supreme Court in Trailmobile Co. v. Whirls, 331 U.S. 40, 67 S.Ct. 982, 91 L.Ed. 1328 (1947); and restated in Oakley v. Louisville & N. R. Co., 338 U.S. 278 at 283, 70 S.Ct. 119 at 122, 94 L.Ed. 87 (1949).

> [A]n honorably discharged veteran, covered by the statute, [is] entitled by the Act to be restored not to a position which would be the precise equivalent of that which he had left when he joined the Armed Forces, but rather to a position which, on the moving escalator of terms and conditions affecting that particular employment, would be comparable to the position which he would have held if he had remained continuously in his civilian employment.

There can simply be no doubt that the plaintiff in this case could not be said to have been moved back to his proper place on the "escalator" as to his retirement rights and benefits if his time in the military service were not included in the computation of his retirement pension. Otherwise this plaintiff would lose ground by reason of his absence.

The Supreme Court has warned that "seniority" is not an inflexible concept:

> In providing that a veteran shall be restored to the position he had before entering the military service "without loss of seniority," § 8 of the Act [50 U.S.C.A. App. § 459] uses the term "seniority" without definition. It is thus apparent that Congress was not creating a system of seniority but recognizing its operation as part of the process of collective bargaining. We must therefore look to the conventional uses of the seniority system in the

8. The "escalator" principle has been incorporated into the Act as subsection 9(c)(2) [50 U.S.C.App. § 459(c)(2)]

> It is declared to be the sense of Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) [of this section] should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.

> process of collective bargaining in order to determine the rights of seniority which the Selective Service Act guaranteed the veteran. Aeronautical Industrial District Lodge 727 v. Campbell, 337 U.S. 521, 526, 69 S.Ct. 1287 at 1290, 93 L.Ed. 1513 at 1518 (1949).

This court is of the considered opinion that great emphasis is to be placed upon the "real nature" of the pension benefits in the case at bar, and it concludes that the purpose of this retirement benefit is to promote personnel stability by giving employees an incentive to remain with the company. Seniority is not an abstract right or position. Rather, seniority is a measurement by which other rights are determined; advancement, promotion, higher pay, vacations and vacation pay, layoffs, supplemental employment benefits, severance pay, and in the present case, retirement and pension benefits. The employee should be able to rely on receiving pension benefits based upon seniority, including the time spent in the military forces. Such a reliance right does not favor this veteran plaintiff over the nonveteran or grant him any super-seniority. *Fishgold*, *supra*. Rather, the right of the veteran to have his military time computed as accredited service guarantees equal competitive status with those employees who did not respond to the call of their country.

This court is led to the inescapable conclusion that, as was stated by our Supreme Court in *Accardi*:

> The requirements of the . . . Act are not satisfied by giving returning veterans seniority in some general abstract sense and then denying them the perquisites and benefits that flow from it. We think it clear that the amount of these [separation] allowances is just as much a perquisite of seniority as the more traditional benefits such as work preference and order of lay-off and recall. 383 U.S. at 230, 86 S.Ct. at 772.

[3] The statutory purpose of the act must be borne in mind at all times so that an employer is not permitted by contract, contrivance or otherwise to remove a large segment of his employees from the scope of the act and thus evade

this basic policy. Dame v. C. A. Batson Co., 157 F.Supp. 862 (D.C.Mass.1957). For this court to deny accredited service to this plaintiff under these circumstances for the time in which he was in the service of his country would be rejection of the holding of still another Supreme Court case, Eagar v. Magma Copper Co., 389 U.S. 323, 88 S.Ct. 503, 19 L.Ed.2d 557 (1967), stating the basic principle that "* * * he who is 'called to the colors is not to be penalized on his return by reason of his absence from his civilian job.' "[9]

> In these times of relatively high wages and steep income taxes, unions bargain vigorously for indirect compensation in the form of a host of diverse benefits. Whether the benefits are elements of "seniority" or "other benefits," the veteran's stake in them must be protected if they would automatically accrue to him but for induction. Clearly, the exclusion of veterans from benefits that have come to be regarded as essential perquisites of employment is inconsistent with the Universal Military Training and Service Act. Hollman v. Pratt & Whitney Aircraft, 435 F.2d 983 at 989 (5th Cir. 1970).

[4] The Secretary of Labor is charged with the administration of the veterans' reemployment rights statutes and published in 1970 the "Veterans' Reemployment Rights Handbook." As indicated in the preface thereto, the Secretary does not have authority to issue binding administrative rulings, but the courts have generally given the Secretary's published interpretations at least "careful consideration and in proper circumstances . . . considerable weight."[10]

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9. Hollman v. Pratt & Whitney Aircraft, 435 F.2d 983 at 988 (5th Cir. 1970); Tilton v. Missouri Pacific Railroad Co., 376 U.S. 169, 170-171, 84 S.Ct. 595, 597, 11 L.Ed.2d 590 (1964): Fishgold v. Sullivan Corp., 328 U.S. 275, 284, 66 S.Ct. 1105, 1111, 90 L.Ed. 1230 (1946).

10. Wirtz v. Keystone Readers Service, Inc., 418 F.2d 249 at 257 (5th Cir. 1969). See, also, Skidmore v. Swift & Co., 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944); and Helton v. Mercury Freight Lines, Inc., 444 F.2d 365 at 368, footnote 4 (5th Cir. 1971), i. e., ". . . the Handbook has . . . a measure of weight."

Chapter XV of the "Veterans' Reemployment Rights Handbook" includes the following pertinent comments at page 91:

> . . . there are numerous . . . benefits which form a part of the veteran's total employment status or "position" and thus come within the purview of the reemployment statute at and after the time he applies for reinstatement. Among these other features of the employment may be such benefits as holiday pay, sick pay, insurance of various types, bonuses, profit sharing plans, *pension or retirement plans*, and severance pay. The reemployment statute does not independently create such benefits for the veteran, but where they have been established by contract, policy, or practice, the statute does affect the manner in which the established rules are applied to him. (Emphasis added.)
>
> * * * * * *
>
> With respect to benefits maturing and enjoyable only during the period of his military absence, the veteran is to be treated like an employee who has been on a non-military furlough or leave of absence. With respect to benefits maturing or enjoyable after his reinstatement, he is to be treated as if he had remained continuously employed rather than absent in military service.

The "Veterans' Reemployment Rights Handbook" further provides on page 97:

> As far as reemployed veterans are concerned, some common threads do run through all retirement problems. Continuity of service with the employer or in the industry is the essence, though perhaps not the entirety, of what a retirement plan is designed to reward, and the reinstated veteran's military service time must of course be counted toward his continuous service with his employer. *In nearly all cases, the retirement annuity or pension is a right or benefit maturing after reinstatement, and as such, is subject to the requirement that the veteran be treated not as if he had been on leave of absence but as if he had remained continuously employed rather than absent for military service*, except where it is shown that credits under the pension plan

> are, in fact, precise additional pay for units of work done. (Emphasis added.)

[5] This court is of the considered opinion that, as has previously been pointed out, there is no evidence in this case to show that the pension plan is based upon any "unit of work" requirement. Hence this court is led to the inescapable conclusion that Sections 459(b) and (c) mandate that the defendant, Alabama Power Company, recompute the plaintiff's accredited service by including the time the plaintiff spent in the service of his country.

THE "OTHER BENEFIT"[11] PROVISION OF THE MILITARY SELECTIVE SERVICE ACT

[6, 7] The defendant, Alabama Power, asks this court to classify the retirement pension benefits under its plan as "other benefits" and therefore to rule that the case is governed by defendant's established rule and practice relating to employees on furlough or leave of absence. This practice has been to treat those employees in military service as if on furlough or leave of absence and therefore to exclude military time in computing "accredited service." However, this path was barricaded by the Supreme Court in *Accardi*, *supra*, wherein the court stated:

> Without attempting in this case to determine the exact scope of this provision of § 8(c) it is enough to say that we consider that it was intended to add certain protec-

11. 50 U.S.C.App. § 459(c) provides in pertinent parts as follows:
Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) [of this section] shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without loss of seniority, *shall be entitled to participate in insurance or other benefits* offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration. (Emphasis added.)

> tions to the veteran not to take away those which are granted him by § 8(b)(B) and the other clauses of § 8(c). 383 U.S. at 232, 86 S.Ct. at 773.

Under this reasoning, the "other benefits" clause must be viewed as a separate addition to the seniority provisions of the act, and it cannot be used as a basis for defining and limiting the perquisites of seniority. While the problem of construction is difficult, it seems most likely that the expression "insurance or other benefits" was meant to cover a fairly narrow group of economic advantages whose common quality was that they were miscellaneous fringe benefits not usually regarded as part of "pay," "status," or "seniority." The "other benefits" clause was added to the act for the express purpose of entitling employees to receive while in the service such benefits as their employers accorded employees on leave or furlough. *Accardi, supra*, 383 U.S. at 231, 86 S.Ct. 768.

THE "GRATUITY" ARGUMENT

[8] The defendant has argued that no law requires it to provide a pension plan for its employees and that the providing of same is a mere gratuity on its part and not an enforceable contract, essentially since the plan, as one of its provisions, specifically states as follows:

IX. LIMITATION OF RIGHTS OF THE EMPLOYEE

> This Plan shall not be deemed to constitute a contract between the Company and any employee or to be a consideration for, or a condition of, the employment of any employee.

It is sufficient answer to this contention to say that it has been a part of the collective bargaining agreement which covered this plaintiff since 1961, regardless of this internal disclaimer. This contention was set at rest in Ball v. Victor

Adding Machine Company, 236 F.2d 170 at 173, 174 (5th Cir. 1956), by cogent reasoning as follows:

> And the idea that a Pension Trust expressly approved, as was this one, by the Internal Revenue Service as a plan qualified under Section 165, 1939 Code, 26 U.S.C.A. § 165; 1954 Code, § 401, 26 U.S.C.A. §§ 401, 402, is a mere gratuity or charitable enterprise beyond even the barest scrutiny by its sole beneficiaries (the employees) is completely out of keeping with the philosophy and purpose of such plans as the means of paying *additional* compensation to the covered employees in a way to afford substantial and immediate tax advantages to the Employer and substantial tax and monetary benefits to the employees. See, Law of Federal Income Taxation, Mertens, 1942, Vol. 4, § 25.69, page 440, §§ 25.70 to 25.76, incl., and full historical background, 1954 Pocket Supplement, §§ 25.70 to 25.75. A pension trust is no will of the wisp for "* * * within the meaning of section 165(a) [it] is a plan established and maintained by an employer primarily to provide systematically for the payment of definitely determinable benefits to his employees over a period of years, usually for life, after retirement * * *." Federal Tax Regulations, § 39.165-1(a)(2). And see, §§ 39.165-1(a)(3), 39.165-4(e). So much so is it for the employees that the statute, Sec. 165(a), requires that the Pension Trust be "for the exclusive benefit of [the] employees" with distribution of corpus and income of such trust limited to "such employees or their beneficiaries" with an absolute prohibition against use or diversion of any such funds to "purposes other than for the exclusive benefit of [the] employees or their beneficiaries". It must be nondiscriminatory as to employees, Regulations, §§ 39.165-1(a), 39.165-4, and forbid diversions, § 39.165-2; and the Employer's contributions are in no sense a gift for they are deductible, "* * * only to the extent that they are ordinary and necessary expenses * * * in carrying on [the] trade or business and are compensation for personal services actually rendered * * *" and together with all other compensation paid to the employee constitutes "a reasonable allowance for compensation for the services actually rendered * * *", Regulations, § 39.23(p)-1-(b), see, e. g., Farnsworth & Co. v. Commissioner, 5 Cir., 203 F.2d 490. "It

> surely cannot be seriously disputed but that such [a pension agreement] on the part of the company forms a part of the consideration for work performed * * *. In this view, the pension thus promised would appear to be as much a part of his 'wages' as the money paid him at the time of the rendition of his services." Inland Steel Co. v. N.L.R.B., 7 Cir., 170 F.2d 247, 253, 12 A.L.R.2d 240, certiorari denied 336 U.S. 960, 69 S.Ct. 887, 93 L.Ed. 1112.

There can therefore be no question that the claim here is contractual in nature and that the pension plan was part of a binding contract. Hence, this court concludes there is no merit in the defendant's assertion that its pension plan is a mere gratuity and not a perquisite of seniority.

THE CONSTITUTIONAL ARGUMENT

[9] This court is not persuaded by the argument of defendant that its constitutional rights would be impaired if it were ordered to increase the pension benefits to be paid to this plaintiff. The Supreme Court of the United States has construed the statute here in question too many times, without declaring it unconstitutional, for this court to be persuaded by such an argument. Fishgold v. Sullivan Drydock & Repair Corp. et al., 328 U.S. 275, 66 S.Ct. 1105, 90 L.Ed. 1230 (1946); Tilton et al. v. Missouri Pacific Railroad Co., 376 U.S. 169, 84 S.Ct. 595, 11 L.Ed.2d 590 (1964); Accardi et al. v. Pennsylvania Railroad Co., 383 U.S. 225, 86 S.Ct. 768, 15 L.Ed.2d 717 (1966); Eagar et al. v. Magma Copper Co., 389 U.S. 323, 88 S.Ct. 503, 19 L.Ed.2d 557 (1967).

[10] Furthermore, the statute in essence prescribes conditions of employment which an employer must accept if he retains the returned veteran more than one year after he has returned from military service, since § 459(c)(1) does not require the employer to retain the veteran in his employ for more than one year. Obviously, if the employer does retain the veteran beyond that one year, he retains that veteran with the mandate of the statute included as an implied provision in such contract of employment as exists between the veteran and his employer. Defendant's retention of plaintiff for more than the one year mandated by the statute waived any impairment of defendant's constitutional rights.

STATUTES OF LIMITATIONS AND THE DOCTRINE OF LACHES

The defendant maintains that the plaintiff is barred from relief because of the Alabama statutes of limitations or because of the equitable doctrine of laches. The dates involved in this suit are not in dispute; it is established that the plaintiff commenced his employment on August 16, 1937, temporarily left the defendant's employment on March 18, 1943, and honorably served his country until October 1, 1945. On October 8, 1945, the plaintiff was reinstated with defendant and continued that employment until he retired on June 1, 1971. The plaintiff's status under the defendant's pension program was reviewed with the plaintiff by the defendant on September 11, 1967, at which time the plaintiff was advised by the defendant that defendant's pension plan did not afford accredited service for the time the plaintiff was in the military service. The plaintiff contacted the appropriate officer of the United States Department of Labor on July 6, 1971, to assist him in pursuing this claim and to request that suit be brought by the U. S. Attorney. Suit was filed by the U. S. Attorney on behalf of the plaintiff on December 20, 1972.

[11, 12] There is no federal statute of limitations applicable to actions brought under 50 U.S.C.A. App. §459. Thus this court must rely upon the statutes of limitations found in Alabama law.[12] To determine which Alabama statute of

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12. O'Sullivan v. Felix, 233 U.S. 318, 322, 34 S.Ct. 596, 598, 58 L.Ed. 980 (1914); Balkam v. Woodstock Iron Co., 154 U.S. 177, 187-188, 14 S.Ct. 1010, 1014, 38 L.Ed. 953 (1894); Moviecolor, Ltd. v. Eastman Kodak Co., 2 Cir. 1961, 288 F.2d 80, 90 A. L.R.2d 252,

limitations is applicable to a Section 459 right, this court must first determine under federal law the nature of the right and then decide which statute of limitation Alabama would have enforced if the action seeking similar relief had been brought in the state court.[13] Deciding which statutory period is appropriate is a two-step process. First, with reference to federal law, this court must determine the "essential nature" of the claim. Then this court must refer to the Alabama courts' interpretation of its statute of limitation to ascertain which period would be applicable to a claim similar to the one before this court. Bell v. Aerodex, Inc., 473 F.2d 869 at 871 (5th Cir. 1973).

The defendant places principal reliance on two recent Fifth Circuit opinions, Bell v. Aerodex, Inc., *supra*, and Blair v. Page Aircraft Maintenance, Inc., 467 F.2d 815 (5th Cir. 1972), where the Fifth Circuit, in passing on *claims for back wages only* under the 1967 act, held that such claims were actions at law and that the court was bound to apply the applicable statutes of limitations of Florida and Alabama. But the defendant's reliance on *Blair* and *Bell* is misplaced. In both of these cases, the Fifth Circuit was careful to note that the claims in question, being only for back wages, should be denominated as "wage cases" and suggested a different result might follow if the wage claims were coupled with claims for the restoration of a veteran's rights.

[13] This court, after a careful review of the pleadings in this case, is of the considered opinion that this is not a suit by the plaintiff for back wages. Rather, the plaintiff primarily seeks an injunctive order, in the nature of the equitable remedy of specific performance, requiring the defendant to include his military service time in computing his

cert. den. 368 U.S. 821, 82 S.Ct. 39, 7 L.Ed.2d 26; Blair v. Page Aircraft Maintenance, Inc., 467 F.2d 815 at 818 (5th Cir. 1972).

13. Sewell v. Grand Lodge of International Association of Machinists and Aerospace Workers, 5 Cir. 1971, 445 F.2d 545, 549, cert. den. 404 U.S. 1024, 92 S.Ct. 674, 30 L.Ed.2d 674 (1972); Beard v. Stephens, 5 Cir., 1967, 372 F.2d 685, 688.

monthly or yearly pension or retirement benefits—back installments *and future installments*. It is true that ultimately the plaintiff will receive an increased amount of money—a precise amount of $17.11 per month at present, and perhaps a different amount if the plan is later changed. However, this court takes judicial notice that all perquisites of seniority will result in some payment of money, i.e., a higher place on the seniority list generally results in a veteran receiving higher wages, longer vacations, etc. As has been previously pointed out, seniority is not an abstract right or position. Rather, seniority is a measurement by which other rights are determined; advancement, promotion, higher pay, vacations and vacation pay, layoffs, supplemental employment benefits, severance pay, and in the present case, retirement and pension benefits. All of these seniority benefits result in the veteran receiving more money than if his military service time were not included in the computation of any of these benefits. Hence, this court concludes that because this is not a strictly "back wage case" suit, the one-year Alabama statute of limitations is not applicable to this action.[14]

The collective bargaining agreement covering the plaintiff at the time of his retirement did include the pension plan as a matter of contract and hence the pension plan was part of his contract of employment. Moreover, the plaintiff in this case has expressly brought a "suit for the restoration of veteran's rights," which this court deems to be an equitable action to restore this veteran plaintiff to the status and seniority he would have obtained had he not responded to the call of his country. Hence, because this case is not a "back wage case" but rather is in the nature of a "suit for the restoration of veteran's rights," this court is of the considered opinion that if any statute of limitations is applicable,

14. Code of Alabama, tit. 7, § 26. Limitation of one year.
The following must be commenced within one year:
* * * * *
Actions for any injury to the person or rights of another, not arising from contract, and not herein specifically enumerated.

it would appear to be the six-year statute of limitations which applies to claims arising out of contracts.[15]

The defendant, Alabama Power, contended in its brief that if the six-year statute of limitations is applied by this court, the plaintiff must still be denied relief for his failure to commence any action within six years from the time he could have successfully maintained a suit based upon that cause of action. Alabama Power asserts that the plaintiff's cause of action arose upon his return to work for Alabama Power on October 8, 1945. This court is of the opinion that this contention by the defendant contains no merit.

[14, 15] In the case of a pension plan, the beneficiary generally has no right of action until his rights have vested by the confluence of the stipulated time with the continued adherence to the conditions of the plan. A failure to assert it before it becomes vested does not start the statute running. Barninger v. National Maritime Union, 372 F.Supp. 908 at 913 (S.D.N.Y.1974). Moreover, the defendant's pension plan, in Section IX, entitled "Limitation of Rights of the Employee," contains the following sentence:

> Inclusion under the Plan will not give any employee any right or claim to a Retirement Income except upon reaching Normal Retirement Date or Early Retirement Date and no employee or Provisional Payee shall be entitled to any right or claim to a Retirement Income except to the extent such right is specifically fixed under the terms of the Plan and there are funds available therefor in the hands of the Trustee.

The court is of the opinion that no claim for relief arose before the plaintiff's retirement date. It is possible that an

15. Code of Alabama, tit. 7, § 21. Limitation of six years.
The following must be commenced within six years:
* * * * *
Actions founded on promises in writing not under seal.
* * * * *
Actions upon any simple contract or specialty, not herein specifically enumerated.

anticipatory breach occurred in 1967 when the defendant informed the plaintiff that he would not get credit in seniority computation under the pension plan for the time spent in military service. However, the law is settled that the plaintiff has the election to bring his claim for anticipatory breach at the time it occurs or he may elect to wait until time for performance.[16] Plaintiff did not elect to declare an anticipatory breach in 1967; therefore, the statute of limitations did not begin to run prior to his retirement in 1971.

[16] If the court is in error in holding that the six-year statute applies, nevertheless the one-year statute would be only a partial bar. Basic hornbook law establishes that where a debt or obligation is payable in installments, the statute of limitations begins to run as to each installment from the time it falls due. Maynor v. Dillin, 241 Ala. 362, 2 So.2d 440 (1941); Hodgson v. Behrens Drug Co., 475 F.2d 1041 at 1050 (5th Cir. 1973); Tye v. Hertz Drivurself Stations, 80 F.Supp. 536 (E.D.Pa.1948), appeal dismissed.

[17] Finally, Alabama Power asserts that if this court determines that the plaintiff's claim for relief constitutes an equitable cause of action, then the claim of plaintiff should be denied because of the plaintiff's inexcusable delay of 35 years in prosecuting his claim to the detriment of Alabama Power. However, this court cannot agree that the doctrine of laches forecloses relief for this retired veteran. The doctrine of laches is an equitable doctrine based on public policy which requires the discouragement of stale demands. Laches is not based upon a mere lapse of time, but is principally a question of the inequity of permitting a claim to be enforced where some change in condition has taken place which would make enforcement of the claim unjust. Muscianese v. United States Steel Corporation, 354 F.Supp. 1394 at 1398 (E.D.Pa.1973).

[18, 19] Laches consists of two basic elements, inexcusable delay in instituting suit and prejudice resulting to the respondent from such delay. Sobosle v. United States Steel

16. Saliba v. Brackin, 260 Ala. 103, 69 So.2d 267 (1954).

Corporation, 359 F.2d 7 at 12 (3rd Cir. 1966). The question of delay, as well as the issue of laches itself, is addressed to the sound discretion of the trial court. Burnett v. New York Central Railroad Company, 380 U.S. 424, 85 S.Ct. 1050, 13 L.Ed.2d 941 (1965). On July 6, 1971, the plaintiff contacted an appropriate officer of the United States Department of Labor to assist him in pursuing his claim. This court finds that the plaintiff was very diligent in pursuing his rights under the defendant's pension program, as the plaintiff contacted the Department of Labor five days after his retirement. Suit was then filed by the U. S. Attorney on behalf of the plaintiff on December 20, 1972. Plaintiff had no obligation to act more quickly. The pension plan itself stated he had no rights thereunder until reaching retirement age. He had the right to rely upon this language. Any delay on his part was clearly excusable.

This court finds no merit in the contention of Alabama Power that it suffered substantial prejudice because the plaintiff delayed his assertion of his rights under the pension program. Furthermore, the court is especially unpersuaded by the argument that defendant will have been prejudiced if the court rules in plaintiff's favor, because defendant will have, by its failure to correctly compute the seniority of its retiring employees, insufficiently funded its pension plan. This court is of the considered opinion that this defendant has had the interest-free use of a certain sum of money, the amount of which is not ascertainable by the evidence, for a number of years, which it otherwise would not have had the use of because it would have been paid into the trust fund. The defendant cannot be heard to complain of the free use, without interest, of this sum of money, whether it be large or small. Hence this court cannot agree with the defendant that the doctrine of laches bars this retired World War II veteran from the seniority rights and benefits which would have automatically accrued to him had he remained in private employment rather than responding to the call of his country.

Accordingly, this court finds that the plaintiff is entitled to have the two-year, six-month and 20-day period he spent in the service of his country computed as "accredited service" under the defendant's retirement pension plan. The plaintiff is thereby entitled to an increase in his retirement pension benefits of $17.11 per month. Additionally, the plaintiff is entitled to an appropriate award to compensate him for loss of this amount in past pension payments, and to a mandatory injunction requiring the defendant to increase the plaintiff's present pension payments from $198.95 per month to $216.06 per month, as to all future installments of his pension. Plaintiff will submit an appropriate order to the court for signature within 30 days.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

RAYMOND E. DAVIS, Plaintiff	)	
vs.	)	CIVIL ACTION
ALABAMA POWER COMPANY,	)	NO. 73-G-1123
Defendant	)	

ORDER

The above-styled cause having come on for trial before the Court and consideration having been given to the pleadings, the stipulations and briefs of the parties, and the evidence received at the trial, and the Court having made its Findings of Fact and Conclusions of Law as set forth in the Memorandum Opinion entered on September 11, 1974, and for good cause shown:

It is ORDERED, ADJUDGED and DECREED that the defendant, its officers, agents, servants, employees and those persons in active concert with it, be and they hereby are,

permanently enjoined and restrained from violating the provisions of the Military Selective Service Act (formerly the Universal Military Training and Service Act), 50 U.S.C. App. 459, with respect to the rights of plaintiff, Raymond E. Davis, and his heirs and assigns in any respect and specifically in any of the following respects:

1. The defendant shall not, contrary to the aforesaid Act, exclude or cause the exclusion of any of the plaintiff's period of absence due to military service from approximately March 18, 1943 to October 8, 1945, for the purpose of determining the plaintiff's years of "Accredited Service" under The Pension Plan of Alabama Power Company.

2. The defendant shall immediately (beginning with the first payment due after September 1, 1974) increase the amount of plaintiff's monthly pension payments from $198.95 to $216.06 and afford him all the benefits and entitlements provided by any future changes in the plan.

3. The defendant shall not continue to withhold from plaintiff his past pension underpayments in the amount of $684.40 (computed thru September 1, 1974) together with interest thereon in the amount of $66.73 (computed through October 1, 1974).

It is further ORDERED that costs be taxed against the defendant, for which let execution issue.

DONE, this the 1st day of October, 1974.

/s/ J. FOY GUIN, JR.

J. FOY GUIN, JR.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

RAYMOND E. DAVIS, Plaintiff,	)	CIVIL ACTION
v.	)	NO. 72-1123-S
ALABAMA POWER COMPANY,	)	Filed: November 26, 1974
Defendant.	)	

NOTICE OF APPEAL

Notice is hereby given that Alabama Power Company, a corporation, defendant in the above-styled action, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment entered in this action and from the Order of the Court overruling defendant's Amended Motion for New Trial entered in this action on the 31st day of October, 1974.

BALCH, BINGHAM, BAKER,
HAWTHORNE, WILLIAMS & WARD

By /s/ MARSHALL TIMBERLAKE

Attorneys for Defendant,
Alabama Power Company

Dated: November 26, 1974

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 74-4149

RAYMOND E. DAVIS,

Plaintiff-Appellee,

v.

ALABAMA POWER COMPANY,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Alabama

(July 1, 1976)

Before AINSWORTH, MORGAN and RONEY, Circuit Judges.

PER CURIAM:

AFFIRMED on the basis of the well-reasoned opinion of District Judge Guin published in 383 F. Supp. 880 (1974).

RONEY, Circuit Judge, dissenting:

I respectfully dissent. All leaves of absence without regular pay are excluded from Accredited Service under Alabama Power Company's Pension Plan. The result reached by the district court accords greater benefits to an employee per leave of absence for military service than for any other leave of absence without pay. Like the Third and Tenth Circuits, I would hold that the benefits provided by the Pension Plan are not prerequisites of seniority under the Act. 50 U.S.C. App. § 459(c) (1) (1970). *See Litwicki v. Pittsburgh Plate Glass Ind., Inc.*, 505 F. 2d 189 (3d Cir. 1974); *Jackson v. Beech Aircraft Corp.*, 517 F. 2d 1322 (10th Cir. 1975). I would reverse.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 74-4149

D. C. Docket No. CA 72-1123-S

RAYMOND E. DAVIS,
Plaintiff-Appellee,

versus

ALABAMA POWER COMPANY,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Alabama

Before AINSWORTH, MORGAN and RONEY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendant-appellant pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

July 1, 1976

RONEY, Circuit Judge, dissenting.
Issued as Mandate: July 23, 1976.

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1976

NO. 76-451

ALABAMA POWER COMPANY,
Petitioner,

v.

RAYMOND E. DAVIS,
Respondent.

ORDER

The petition for a writ of certiorari is granted limited to Question 1 presented by the petition.

January 10, 1977

Military Selective Service Act, 62 Stat. 614, *as amended*
50 U.S.C. App. § 459 (b) & (c)

§ 459. Separation from service

(b) Reemployment rights

In the case of any such person who, in order to perform such training and service, has left or leaves a position (other than a temporary position) in the employ of any employer and who (1) receives such certificate, and (2) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

(A) if such position was in the employ of the United States Government, its Territories, or possessions, or political subdivisions thereof, or the District of Columbia, such person shall—

(i) if still qualified to perform the duties of such position, be restored to such position or to a position of like seniority, status, and pay; or

(ii) if not qualified to perform the duties of such position by reason of disability sustained during such service but qualified to perform the duties of any other position in the employ of the employer, be restored to such other position the duties of which he is qualified to perform as will provide him like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in his case;

(B) if such position was in the employ of a private employer, such person shall—

(i) if still qualified to perform the duties of such position, be restored by such employer or his successor in interest to such position or to a position of like seniority, status, and pay; or

(ii) if not qualified to perform the duties of such position by reason of disability sustained during such service but qualified to perform the duties of any other position in the employ of such employer or his successor in interest, be restored by such employer or his successor in interest to such other position the duties of which he is qualified to perform as will provide him like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in his case,

unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

(C) if such position was in the employ of any State or political subdivision thereof, it is declared to be the sense of the Congress that such person should—

(i) if still qualified to perform the duties of such position, be restored to such position or to a position of like seniority, status, and pay; or

(ii) if not qualified to perform the duties of such position by reason of disability sustained during such service but qualified to perform the duties of any other position in the employ of the employer, be restored to such other position the duties of which he is qualified to perform as will provide him like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in his case.

(c) Service considered as furlough or leave of absence

(1) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) [of this section] shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time

such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

(2) It is declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) [of this section] should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.

(3) Any person who holds a position described in paragraph (A) or (B) of subsection (b) [of this section] shall not be denied retention in employment or any promotion or other incident or advantage of employment because of any obligation as a member of a reserve component of the Armed Forces of the United States.

Pension Plan For Employees of Alabama Power Company, as amended to and including Amendment of January 1, 1971.

PENSION PLAN
of
ALABAMA POWER COMPANY

INTRODUCTORY STATEMENT

The Pension Plan of Alabama Power Company which became effective on July 1, 1944, and was amended December 5, 1945, July 15, 1946 and September 20, 1948, was one of several similar plans which were adopted by The Commonwealth & Southern Corporation (Delaware) and its subsidiaries while Alabama Power Company was a part of that system before its divestment on September 30, 1949.

As of January 1, 1951, as of January 1, 1956, as of January 1, 1961, and as of January 1, 1966 the Company made certain changes in the Plan. As of January 1, 1971 the Company has made certain further changes which are contained in the Plan which follows.

SECTION I. DEFINITIONS

The following words and phraseology as used herein shall have the following meanings unless a different meaning is plainly required by the context:

"Plan" The Pension Plan of Alabama Power Company as described in this instrument.

"Effective Date of the Plan" July 1, 1944.

"Company" Alabama Power Company and any successor or successors thereof and any wholly owned subsidiary thereof which the Board of Directors of said Company may from time to time, and upon such terms and conditions as may be fixed by said Board of Directors, determine to bring under the Plan.

"Board of Directors" The board of directors of Alabama Power Company.

"Employee" Each person employed by the Company except that any person who is a member of the United Mine Workers of America, at the date of his employment, or on October 1, 1948 or thereafter becomes a member of said Union or any other mine workers union having a retirement or similar fund, shall on the date of his employment or on October 1, 1948 or the date of his becoming a member, whichever is later, be deemed for the purposes of the Plan to have terminated his employment with the Company on such date; provided, that any such person shall again become an employee as herein defined upon termination of his membership in such Union subject to inclusion in the Plan as a new employee if and when he meets the requirements of the Plan.

"Retirement Board" The managing board of the Plan provided for in Section XI.

"Trust Fund" The fund to be established under a Trust Agreement by contributions made by the Company and from which the amounts of Retirement Income are to be paid.

"Trust Agreement" The agreement providing for the Trust Fund.

"Trustee" The Trustee under the Trust Agreement providing for the Trust Fund.

"Accredited Service" With respect to any employee, the period of his "Future Service" as defined below, to-

gether with the period of his "Past Service" as defined below, if any.

"Future Service" The period of service of an employee with the Company after July 1, 1944 and subsequent to the date of his inclusion in the Plan.

"Past Service" The period of service prior to July 1, 1944, whether or not continuous, of an employee with Alabama Power Company and predecessor companies (including service with companies or properties now affiliated or associated with the Company, and service with companies or properties heretofore affiliated or associated prior to the date of severance of such affiliation or association), and if a man after his 30th, and if a woman after her 25th birthday, provided that, for the purpose of payments on and after January 1, 1951, subject to the provisions of Section VII hereof, such period of service prior to July 1, 1944 shall, if resulting in an earlier date of commencement, commence on the date on which the employee first completed one year of such service and attained the age of 25.

"Retirement Income" The monthly retirement income provided for by the Plan.

"Future Service Retirement Income" That part of an employee's Retirement Income computed on the basis of his Future Service pursuant to subsection 2 of Section V.

"Past Service Retirement Income" That part of an employee's Retirement Income computed on the basis of his Past Service pursuant to subsection 3 of Section V.

"Accrued Retirement Income" With respect to any employee at any particular date, the Retirement Income beginning at Normal Retirement Date which would be

payable to such employee at the rates provided in subsections 2 and 3 of Section V, on the basis of his Accredited Service rendered to the date of the computation, limited, however, by the provisions with respect to transfer in subsection 5 of Section III. For possible increase in Accrued Retirement Income for service rendered prior to January 1, 1956, see subsection 10 of Section V. For possible increase in Accrued Retirement Income for service rendered prior to January 1, 1961, see subsection 11 of Section V. For possible increase in Accrued Retirement Income for service rendered prior to January 1, 1966, see subsection 12 of Section V. For possible increase in Accrued Retirement Income for service rendered prior to January 1, 1971, see subsection 13 of Section V.

"Accrued Future Service Retirement Income" An employee's Accrued Retirement Income as above defined but computed solely upon the basis of his Future Service rendered to the date of computation.

"Accrued Past Service Retirement Income" An employee's Accrued Retirement Income as above defined but computed solely upon the basis of his Past Service.

"Normal Retirement Date" The first day of the month following an employee's 65th birthday.

"Early Retirement Date" The first day of the month following the retirement of an employee on or after his 55th birthday and before his 65th birthday.

"Deferred Retirement Date" The first day of the month after a retirement subsequent to the Normal Retirement Date.

"Provisional Payee" A spouse designated by an employee pursuant to Section VI to receive Retirement Income on the death of the employee.

The masculine pronoun wherever used herein shall mean or include the feminine pronoun where applicable.

Wherever reference is made in the Plan to companies "now affiliated or associated" it shall mean the companies formerly in the Commonwealth & Southern system which adopted similar plans, including The Southern Company and Southern Services, Inc. It shall also include Southern Electric Generating Company and any other company which the Board of Directors of the Company deems to be "now affiliated or associated" for the purpose of transfers or other specified purpose and so declares by resolution.

For the sole purpose of qualifying under the Plan so as to entitle an employee to have Future Service Retirement Income accrue to him, service with a company which is at the time of his employment by the Company a subsidiary, an associate or affiliate of the Company shall be deemed to be service with the Company provided such service is immediately prior to employment by the Company.

SECTION II. ELIGIBILITY

1. Present Employees Included in the Plan on July 1, 1944. Each full-time regular employee of the Company on July 1, 1944 is included in the Plan (subject to the provisions of the last paragraph of this subsection 1 of Section II) on that date if he has immediately prior to such date completed at least one year of continuous service with the Company or with companies or properties affiliated or associated with the Company, and, if a man, has attained his 30th but not 65th birthday and, if a woman, has attained her 25th but not her 60th birthday.

Present Employees Qualifying After July 1, 1944. Each other full-time regular employee of the Company on July 1, 1944 will be included in the Plan (subject to the provisions of the last paragraph of this subsection 1 of Section II) on the first day of the month immediately following the date on which he first completes such service and has attained such age of 30 or 25, as the case may be, provided that at the date of the completion of such service he has not attained his 65th birthday if a man or her 60th birthday if a woman.

Future Employees Qualifying under the Plan. Each full-time regular employee who enters the service of the Company after July 1, 1944 will be included in the Plan (subject to the provisions of the last paragraph of this subsection 1 of Section II) on the first day of the month immediately following the date on which he first completes such service and attains such age of 30 or 25, as the case may be, provided he has not, on such date, attained his 56th birthday if a man or her 51st birthday if a woman.

Inclusion After January 1, 1951. The first three paragraphs of this subsection are qualified by the provisions hereof that with respect to employees included under the Plan, before January 1, 1951, the date of inclusion in the Plan, for the purpose of payments on and after January 1, 1951, subject to the provisions of Section VII hereof, shall be the first day of the month immediately following the date on which an employee first completes one year of such service and attains the age of 25, if such date is earlier than the date of inclusion under pursuant to the provisions of the first three paragraphs of this subsection; and that with respect to employees not included in the Plan before January 1, 1951, the date of inclusion in the Plan shall be the first day of the month immediately following the date on which the employee first completes one year of such service and attains the age of 25, provided such employee has not on such date attained the age of 56. The foregoing does not restrict the right of transfer to this Plan from the plan of a company now affiliated or associated with the Company with substantially the same terms as this Plan pursuant to subsection 5 of Section III notwithstanding the fact that at the time of transfer to this Company, the tranferred employee has attained his 56th birthday.

2. Persons in Military Service and Employees on Authorized Leave of Absence. Any person not already included in the Plan who leaves or has left the employ of the Company to enter

the Armed Forces of the United States or is on authorized leave of absence without regular pay and who returns to the employ within a reasonable time after discharge from such service (which reasonable time shall not in any event be construed to be less than 90 days or such longer period as may be fixed by law) or at or before termination of his leave of absence, shall, upon such return, be included in the Plan if and when he has met the requirements of subsection 1 of this Section. In determining continuity or immediacy of service referred to in such subsection, the period of such absence in the Armed Forces of the United States or on such authorized leave of absence without regular pay shall be deemed not to have existed.

An employee who is on authorized leave of absence and receiving his regular pay shall be considered a full-time regular employee and shall be included in the Plan if and when he meets the requirements of subsection I of this Section regardless of whether he is, on the date of such inclusion, on such leave of absence.

SECTION III. DETERMINATION OF ACCREDITED SERVICE

1. Accredited Service. Each employee included in the Plan in accordance with Section II shall be credited with Accredited Service in accordance with the definition of that term in Section I hereof.

2. Crediting of Past Service. Past Service, if any, as defined in Section I, shall be credited to all employees included in the Plan (a) who were so included on July 1, 1944, (b) who were on the payroll on July 1, 1944 and subsequently were included in the Plan without lapse of employment since July 1, 1944, or (c) who were on authorized leave of absence without regular pay or in the Armed Forces on July 1, 1944 and were included in the Plan on or after their return to the employ of the Company as provided in Section II hereof. Employees designated in (c) above shall not be credited with Past Service for the period of such leave of absence or service in the Armed Forces, except

as provided in subsection 3(a) of this Section III. No other employee included in the Plan shall be entitled to such Past Service.

3. Crediting of Future Service. Each employee included in the Plan in accordance with Section II shall be credited with Future Service as defined in Section I for service rendered to the Company subsequent to the date of his inclusion in the Plan. Any such employee who is on authorized leave of absence with regular pay shall be credited with Future Service during the period of such absence. Employees on authorized leave of absence without regular pay and persons in the Armed Forces shall not be credited with Future Service for the period of such absence, except as provided in subsection 3(a) of this Section III.

3(a). Crediting of Certain Periods of Absence while in Military Service. An employee who is in the active service of the Company on January 1, 1966 and who is included in the Plan on that date who meets the requirements of paragraphs (A), (B) and (C) below with respect to his absence from the service of the Company while on active duty in the Armed Forces of the United States during either or both or any part of the periods specified in paragraph (B) shall, subject to the provisions of the next sentence, be credited with Accredited Service for the period or periods of his absence between the date specified, or for so much of such period or periods of his absence as meets the requirements of paragraphs (A), (B) and (C). The aggregate of the periods of such absence to be credited to such employee may not exceed the period of his continuous service with the Company immediately prior to his inclusion in the Plan which does not constitute Accredited Service, less one year of continuous service required for eligibility under Section II. For the purpose of determining such period of continuous service and such continuity of service, a period of absence in the Armed Forces of the United States or an authorized leave of absence without pay shall be deemed not to have existed.

(A) He left the employ of the Company and entered the Armed Forces of the United States directly upon leaving the employ of the Company. He served on active duty during either or both or any part of the periods specified in (B) for not less than 120 days. He returned to the employ of the Company within 90 days after he first became eligible for discharge or release from active duty with such Armed Forces under honorable conditions.

(B) December 1, 1941 to December 31, 1946 and June 1, 1950 to December 31, 1955.

(C) Only so much of any period of absence during the periods specified in (B) as would have constituted Accredited Service had he continued in the employ of the Company instead of entering the Armed Forces shall be taken into account. Any period of absence during the periods specified in (B) of an employee who is considered a new employee under subsection 4 of Section III which occurred prior to the time he most recently became a new employee in accordance with subsection 4 of Section III shall not be taken into account.

An employee who, in accordance with this subsection 3(a) is entitled to be credited with Future Service with respect to all or part of his period of absence while on active duty in the Armed Forces of the United States shall be deemed to have been paid earnings during such period of absence or part thereof at the rate being paid to him immediately prior to the time he left the employ of the Company to enter the Armed Forces of the United States.

4. Employees Leaving Company's Service. If the service of an employee of the Company is terminated prior to retirement as provided by Section IV such employee will forfeit any Accredited Service which he may have, provided, however, that this shall not affect the rights, if any, of an employee under Section VII nor shall the rights of an employee be affected during or by reason of a lay-off, due to lack of work, which continues for a period of one year or less, except that such period of lay-off shall not be deemed to be service with the Company.

If the service of an employee is terminated, or if he is not re-employed before the expiration of one year after being laid off for lack of work, and he is subsequently re-employed, he will, for the purposes of this Plan, be considered a new employee.

Forfeitures arising by reason of an employee's termination of service for any reason shall not be applied to increase the benefits any employee would otherwise receive under the Plan at any time prior to the termination of the Plan or the complete discontinuance of contributions by the Company thereunder.

5. Transfers to or from Affiliated Companies. In the case of the transfer of an employee of the Company to any company now affiliated or associated with the Company which has at the time of transfer a pension plan with substantially the same terms as this Plan, such employee, if and when he commences to receive on or after Normal Retirement Date retirement income under such plan of the company to which transferred, shall also receive Retirement Income under this Plan based upon his Accrued Future Service Retirement Income at the time of his transfer plus that proportionate part of his Past Service Retirement Income as the actuarial value of the Company's contributions for Past Service Retirement Income for all employees at the time of his transfer bears to the actuarial value of the Past Service Retirement Income for all employees. The proportionate part of such employee's Past Service Retirement Income so determined shall thereafter be considered to be his Accrued Past Service Retirement Income for all purposes of this Plan, including particularly Section XIII. If and when such an employee commences to receive on an Early Retirement Date retirement income under such plan of the company to which transferred, the amount of any Retirement Income payable to him in accordance with the provisions of this subsection 5 of Section III shall be the Retirement Income hereinabove in this paragraph referred to reduced in accordance with the provisions of the Plan relating to Retirement Income payable at Early Retirement Date.

In the case of the transfer to this Company of an employee of any company now affiliated or associated with the Company which has at the time of transfer a pension plan with substantially the same terms as this Plan, the Company will, subject to the provisions of Section X, make periodical contributions into this Plan to the extent necessary to provide the portion of the Retirement Income not provided for him in the pension plan of the company from which he was transferred.

In no case, however, shall any such employee who retires pursuant to subsection 1, 2 or 3 of Section IV hereof, or the Provisional Payee of a deceased employee entitled to payment in accordance with subsection 2 of Section VI, receive Retirement Income from both plans aggregating less than the minimum Retirement Income specified in subsection 4 of Section V. In the event that the aggregate of the Accrued Retirement Incomes under both plans does not equal the minimum Retirement Income for any retired employee, or the Provisional Payee of a deceased employee entitled to payment in accordance with subsection 2 of Section VI, then each company shall increase its payment by that proportionate part of the deficiency as the Accrued Retirement Income for such employee under its plan bears to the aggregate of the Accrued Retirement Incomes for such employee.

In the event that any such transfer of an employee to or from affiliated or associated companies is made after July 1, 1944 but prior to the putting into effect of such pension plans by both companies, such transfer shall be considered to have been made as of July 1, 1944.

SECTION IV. RETIREMENT

1. Retirement at Normal Retirement Date. It is the intention of the Plan that employees will retire upon reaching Normal Retirement Date.

2. Retirement at Deferred Retirement Date. At the request of the Company and with the approval of the Board of Directors from year to year an employee included in the Plan may

remain in active service after his Normal Retirement Date for such year. Termination of service of such an employee for any reason after Normal Retirement Date shall be deemed retirement as provided in the Plan.

3. Retirement at Early Retirement Date. An employee having at least 20 years of Accredited Service (including any Accredited Service to which he is entitled under the pension plan of any company or companies now affiliated or associated with the Company, from which such employee was transferred pursuant to subsection 5 of Section III and including for the purposes of this subsection 3, Accredited Service under the Retirement Income Plan for Employees of Birmingham Electric Company, as amended) may elect to retire on an Early Retirement Date on or after his 55th birthday and before his 65th birthday (subject, however, to the consent of the Company if he has not attained age 60) and to have his Retirement Income under the Plan commence on that date. The amount of Retirement Income payable will be equal to the employee's Accrued Retirement Income on his Early Retirement Date reduced by 3/10ths of 1% for each calendar month by which his Early Retirement Date precedes his Normal Retirement Date. At the option of the employee exercised at the time of such retirement, provided he shall not have made a designation of a Provisional Payee pursuant to Section VI which has become effective, he may have his Retirement Income at Early Retirement Date adjusted upwards in an amount which will make his Retirement Income payable up to age 65 equal, as nearly as may be, to the amount of his Federal primary Social Security benefits (primary old age insurance benefit) estimated to become payable after age 65, as computed at the time of his retirement, plus a reduced amount, if any, of Retirement Income actuarially determined to be payable after such age 65.

SECTION V. RETIREMENT INCOME

1. Normal Retirement Income. The monthly Retirement Income payable to an employee who retires from the service

of the Company at Normal Retirement Date will be the sum of his monthly Future Service Retirement Income and Past Service Retirement Income, if any, calculated pursuant to this Section V.

While the Company hopes and expects to continue the Plan indefinitely, it reserves the right to terminate or modify it subject to the provisions of Section XV hereof; moreover, the cost of providing Past Service Retirement Incomes (including any unfunded part of the benefits resulting from amendments subsequent to July 1, 1944) is to be provided over a period of years. Nothing herein is to be construed as requiring the Company to continue to make Future Service contributions as described in Section X, or to complete the making of Past Service contributions as described in Section X, subject to the provisions of Section XV hereof, or to confer upon the employees any rights other than those they may have hereunder with respect to the funds held in the Trust Fund, which with the income thereon can never, prior to the satisfaction of all liabilities with respect to employees under the Plan, be used or diverted to purposes other than for the exclusive benefit of the employees.

2. Calculation of Future Service Retirement Income. The annual Future Service Retirement Income receivable on and after January 1, 1951 by each employee included in the Plan who retires or has retired from the service of the Company at Normal Retirement Date will be the sum of

(a) 1% of each fiscal year's earnings up to $3,000 during the period of Future Service up to January 1, 1956, 1¼% of each fiscal year's earnings up to $4,200 during the period of Future Service on and after January 1, 1956 and up to January 1, 1961, 1.33% of each fiscal year's earnings up to $4,800 during the period of Future Service on and after January 1, 1961 and up to January 1, 1966 and 1.33% of each fiscal year's earnings up to $6,600 during the period of Future Service on and after January 1, 1966 and up to January 1, 1971, and 1.50% of each fiscal year's earnings up to $7,800 during the period of Future Service on and after January 1, 1971 up to January 1, 1972, and 1.50% of each fiscal year's earnings up to $9,000 during the period of Future Service on and after January 1, 1972; and

(b) 1½% of each fiscal year's earnings in excess of $3,000 during the period of Future Service up to January 1, 1956, 1¾% of each fiscal year's earnings in excess of $4,200 during the period of Future Service on and after January 1, 1956 and up to January 1, 1961, and 2% of each fiscal year's earnings in excess of $4,800 during the period of Future Service on and after January 1, 1961 and up to January 1, 1966 and 2% of each fiscal year's earnings in excess of $6,600 during the period of Future Service on and after January 1, 1966 and up to January 1, 1971, and 2% of each fiscal year's earnings in excess of $7,800 during the period of Future Service on and after January 1, 1971 and up to January 1, 1972, and 2% of each fiscal year's earnings in excess of $9,000 during the period of Future Service on and after January 1, 1972.

Future Service Retirement Income will be payable monthly at 1/12th of the annual amount determined as above. In the case of an employee who did not have earnings in each month in any such fiscal year, the above-mentioned dollar limits shall be reduced in the amount of 1/12th thereof for each such month during which he had no earnings before applying the designated percentages. The fiscal year shall be as determined by the Retirement Board.

The amendments to the Plan effective as of January 1, 1971 have been adopted in the light of and with regard to the maximum amount of remnueration of an individual upon which the tax for old age insurance is imposed by the Federal Insurance Contribution Act, $7,800 commencing January 1, 1971, and $9,000 commencing January 1, 1972. If such amount ($9,000) shall be increased, from time to time, the Company, in its discretion, may amend the Plan to substitute such larger amounts in place of $9,000 referred to in paragraphs (a) and (b) of this subsection 2.

3. Calculation of Past Service Retirement Income. The monthly amount of Past Service Retirement Income receivable on and after January 1, 1951 by each employee with Past Service included in the Plan who retires or has retired from the service of the Company at Normal Retirement Date will be equal to 1¼% of the employee's monthly rate of earnings as of April, 1943, multiplied by the number of years (including credit for completed months) of Past Service as defined in Section I. If such employee was not in the active service of the Company in April, 1943, then the monthly rate of earnings shall be as of the nearest prior month in which he was in such service or, if he has had no service prior to April, 1943, then as of the first month of such service. Such monthly rate of earnings in the case of an employee paid weekly or bi-weekly shall be considered to be equivalent to the regular hourly rate of pay times the number of hours in the regular work week times 41⅓.

4. Minimum Retirement Income. (a) Subject to the provisions of Sections VI and VII and to the provisions of paragraph (b) (i) of this subsection 4, if minimum Retirement Income computed in accordance with such paragraph shall be greater, the minimum Retirement Income payable on and after January 1, 1961 to an employee included in the Plan retiring or retired from the service of the Company at Normal Retirement Date, who has (or had at his Normal Retirement Date) 30 or more years of service (whether or not Accredited Service) with the Company (including service with companies or properties now affiliated or associated with the Company, service with companies or properties heretofore so affiliated or associated prior to the date of severance of such affiliation or association and service with Birmingham Electric Company) shall be such amount as, together with one-half of any Federal primary Social Security benefit (primary old age insurance benefit) payable to such employee at the time of retirement (regardless of when he retired or retires) or which upon application would be or would have been payable to him or which would be or would have been payable if the employee had not disqualified himself to receive payment thereof, plus any benefit payable to him under

the Retirement Income Plan for Employees of Birmingham Electric Company, shall equal $125 per month. If such employee has, or at his Normal Retirement Date had, less than 30 years of such service, such minimum shall be reduced $1.50 for each full year less than 30 years. In the event of any change in the amount of any Federal primary Social Security benefit payable to such employee after retirement, such minimum Retirement Income will not be adjusted.

In the case of a retired female employee entitled to receive minimum Retirement Income under this subsection 4(a) on and after January 1, 1961 whose Normal Retirement Date was the first day of the month after her 60th birthday, the amount of Federal primary Social Security benefit to be taken into account in accordance with this subsection 4(a) for the purpose of payments on and after January 1, 1961, shall be based on the Federal primary Social Security benefit payable, or which upon application would have been payable to her, or which would have been payable if the employee had not disqualified herself to receive payment thereof, on the first day of the month after the employee's 65th birthday.

(b) Retirement after January 1, 1966. (i) The minimum Retirement Income payable after January 1, 1966 to an employee included in the Plan retiring from the service of the Company after January 1, 1966 at Normal Retirement Date or Deferred Retirement Date (before adjustment for Provisional Payee designation, if any) shall be an amount equal to 1% of his monthly earnings on his Normal Retirement Date multiplied by his years of Accredited Service, reduced by an amount equal to one-half of the amount, if any, by which any Federal primary Social Security benefit (primary old age insurance benefit) to which he shall be entitled after attaining age 65 in accordance with the Social Security Act in force at his retirement or at his Normal Retirement Date, if earlier, shall exceed $168 per month. An employee shall be deemed to be entitled to receive Federal primary Social Security benefits after attaining age 65 regardless of the fact that he may have disqualified himself to receive payment thereof.

(ii) The minimum Retirement Income payable after January 1, 1966 to an employee included in the Plan retiring from the service of the Company after January 1, 1966 at his Early Retirement Date (before adjustment for Provisional Payee designation, if any) shall be an amount equal to 1% of his monthly earnings on his Early Retirement Date multiplied by his years of Accredited Service, reduced by an amount equal to one-half of the amount, if any, by which any Federal primary Social Security benefit (primary old age insurance benefit) to which it is estimated he will become entitled after attaining age 65, should he then be alive, computed at the time of his retirement in accordance with the Social Security Act in force at such time, shall exceed $168 per month; the amount remaining shall be further reduced by 3/10ths of 1% for each calendar month by which his Early Retirement Date precedes his Normal Retirement Date.

(iii) The Minimum Retirement Income payable after January 1, 1966 to the Provisional Payee of an employee in accordance with subsection 2 of Section VI by reason of the death of the employee on or after January 1, 1966 prior to retirement and after the effective date of his Provisional Payee designation, shall be based on an amount equal to 1% of the employee's monthly earnings at the time of his death (or his Normal Retirement Date, if earlier) multiplied by his years of Accredited Service, reduced by an amount equal to one-half of the amount, if any, by which any Federal primary Social Security benefit (primary old age insurance benefit) which it is estimated he would have been entitled to receive after attaining age 65, had he not died, computed at the time of his death in accordance with the Social Security Act in force at such time, shall exceed $168 per month; the amount remaining shall be further reduced by the actuarial adjustment for the Provisional Payee election in effect at the employee's date of death.

For the purposes of paragraphs (i), (ii) and (iii), in determining the number of years of Accredited Service, completed months of service will be counted as fractions of a year.

For the purposes of paragraphs (i), (ii) and (iii), in the case of an employee of Birmingham Electric Company who, prior to Normal Retirement Date, became an employee of the Company by reason of the merger of the former into the latter: (a) to the number of years of his Accredited Service to be taken into account there shall be added any years of Accredited Service accrued to him to December 1, 1952 under the Retirement Income Plan for Employees of Birmingham Electric Company; (b) the amount determined by multiplying 1% of his monthly earnings by his years of Accredited Service (including his Accredited Service to December 1, 1952 under the Retirement Income Plan for Employees of Birmingham Electric Company) as provided in paragraphs (i), (ii) and (iii) shall be reduced by the amount of retirement income, if any, accrued to the employee to December 1, 1952 under the Retirement Income Plan for Employees of Birmingham Electric Company.

(c) Retirement After January 1, 1971. Upon the occurrence after January 1, 1971 of any of the several events referred to in paragraphs (i), (ii) and (iii) of paragraph (b) of this subsection 4, the minimum Retirement Income payable to an employee after January 1, 1971 shall be determned in accordance with the following provisions:

(A) Upon the retirement of an employee from the service of the Company after January 1, 1971 at Normal Retirement Date or Deferred Retirement Date, the minimum Retirement Income payable to him after January 1, 1971 shall be determined in accordance with the provisions of paragraph (i) of paragraph (b), modified as follows: There shall be substituted in place of "January 1, 1966", "January 1, 1971" and in place of "1%" there shall be substituted "1.075%"; after "$168 per month", there shall be added "but in no event shall such reduction exceed 60% of the amount of his estimated Federal primary Social Security benefit". To the end of paragraph (i) there shall be added: "In estimating the amount of the Federal primary Social Security benefit to which the employee would be entitled at age 65,

it shall be assumed that he will receive no wages for Social Security purposes after his Normal Retirement Date and it will be further assumed in calculating his estimated Federal primary Social Security benefits that the amount thereof will be the amount determined under the recomputation provision, if applicable, of the Social Security Act in effect at his retirement or at his Normal Retirement Date, if earlier."

(B) Upon the retirement of an employee from the service of the Company after January 1, 1971 at his Early Retirement Date, the minimum Retirement Income payable to him after January 1, 1971 shall be determined in accordance with the provisions of paragraph (ii) of paragraph (b), modified as follows: There shall be substituted in place of "January 1, 1966", "January 1, 1971" and in place of "1%" there shall be substituted "1.075%"; after "$168 per month", there shall be added "but in no event shall such reduction exceed 60% of the amount of his estimated Federal primary Social Security benefit". To the end of paragraph (ii) there shall be added: "In estimating the amount of the Federal primary Social Security benefit to which the employee would be entitled at age 65, it shall be assumed that he will receive no wages for Social Security purposes after his Early Retirement Date and it will be further assumed in calculating his estimated Federal primary Social Security benefits that the amount thereof will be the amount determined under the recomputation provision, if applicable, of the Social Security Act in effect at his Early Retirement Date."

(C) The minimum Retirement Income payable after January 1, 1971 to the Provisional Payee of an employee in accordance with paragraph (iii) of paragraph (b) by reason of the death of the employee after January 1, 1971 prior to retirement and after the effective date of his Provisional Payee designation shall be determined in accordance with the provisions of paragraph (iii) of paragraph (b) modified as follows: There shall be substituted in place of "January 1,

1966", "January 1, 1971" and in place of "1%" there shall be substituted "1.075%"; after "$168 per month" there shall be added "but in no event shall such reduction exceed 60% of the amount of his estimated Federal primary Social Security benefit". To the end of the first paragraph of paragraph (iii) there shall be added: "In estimating the amount of Federal primary Social Security benefit to which the employee would have been entitled at age 65, had he not died, it shall be assumed that he would not have received any wages for Social Security purposes after the date of his death and it will be further assumed in calculating his estimated Federal primary Social Security benefits that the amount thereof will be the amount determined under the recomputation provision, if applicable, of the Social Security Act in effect at the time of his death."

5. Deferred Retirement Income. The monthly amount of Retirement Income commencing at Deferred Retirement Date will be the same monthly amount as if the employee had, in fact, retired at Normal Retirement Date.

6. Early Retirement Income. The monthly amount of Retirement Income commencing at Early Retirement Date will be as provided in subsection 3 of Section IV.

7. Earnings. The word "earnings" as used in the Plan means the salary or wages paid to the employee within any specified period without including overtime and before deductions for taxes, social security, etc.

8. Payment of Retirement Income. The first payment of an employee's Retirement Income will be made on his Normal Retirement Date or Deferred Retirement Date or Early Retirement Date, as the case may be. In the event of the death of an employee who has designated a Provisional Payee in accordance with Section VI, if the designation has become effective, the first payment to be made to the Provisional Payee pursuant to that Section will be made to the Provisional Payee on the first day of the month after the employee's death, if the Provisional Payee shall then be alive and proof of the employee's

death satisfactory to the Retirement Board shall have been received by it. Subsequent payments will be made monthly thereafter.

Notwithstanding the provisions herein for the monthly payment of Retirement Income, such income will be payable quarterly, semi-annually or annually in adjusted amounts as the Retirement Board may determine if the amount of the Retirement Income is less than $10 per month.

9. Termination of Retirement Income. The monthly payment of the Retirement Income will cease with the last payment preceding the retired employee's death; subject, however, to the continuation of payments to a surviving Provisional Payee, if one has been designated, which likewise will cease with the last payment preceding the death of the Provisional Payee. There shall be no benefits payable under the Plan on behalf of any employee whose death occurs prior to his retirement, except as otherwise provided in Section VI with respect to a Provisional Payee of an employee. Following the death of an employee and of his Provisional Payee, if any, no further payments will be made under the Plan on account of such employee or to his estate.

10. Retirement Income for service to January 1, 1956. Notwithstanding any other provision of the Plan, including but not limited to subsection 5 of Section V, Accrued Retirement Income with respect to service prior to January 1, 1956 shall be recomputed in accordance with the following provisions. For the purpose of this subsection 10 the term "transferor" shall mean any company now affiliated or associated with the Company from which an employee was transferred pursuant to subsection 5 of Section III and the term "transferee" shall mean any company now affiliated or associated with the Company to which an employee was transferred from the Company pursuant to subsection 5 of Section III.

(a) Each employee who was in the active service of the Company on January 1, 1956 and included in the Plan on that date shall be entitled, with respect to his Accrued Retirement

Income for services prior to January 1, 1956 under the Plan or under the plan of any transferor, to such increase, if any, in the amount of his Accrued Retirement Incomes as will bring the aggregate of his Accrued Retirement Incomes to January 1, 1956 to an amount equal to 1% of his monthly earnings on January 1, 1955 (from the Company or from any transferor) multiplied by his years of service from the earlier of (1) the date of the beginning of his Accredited Service under the Plan, or (2) the date of the beginning of his Accredited Service under the plan of any transferor (Accredited Service being determined as under the Plan if resulting in an earlier date), to January 1, 1956. Completed months of service will be counted as fractions of a year for this purpose. In the case of an employee transferred to the Company, pursuant to subsection 5 of Section III, between January 1, 1955 and January 1, 1956 from a transferor which does not have a similar provision with respect to service prior to January 1, 1956 applicable to such employee, his initial monthly earnings received from the Company will be used instead of his monthly earnings on January 1, 1955, if the former be higher.

(b) In the event that an employee of the Company then included in the Plan was, prior to January 1, 1956, transferred to a transferee which has a similar provision with respect to service prior to January 1, 1956 applicable to such employee, he will be entitled, under the Plan, to that part of the aggregate of his Accrued Retirement Income as computed in accordance with paragraph (a) of this subsection 10 in the proportion that his Accrued Retirement Income under the Plan for his years of service prior to January 1, 1956 bears to the aggregate of the Accrued Retirement Incomes for such employee for such years of service, as computed before recomputation of his Retirement Income pursuant to paragraph (a) of this subsection 10.

(c) An employee of the Company who meets the requirements of paragraph (a) of this subsection 10 and who was transferred from a transferor shall be entitled to such Retirement Income under the Plan with respect to his service prior

to January 1, 1956 as shall be sufficient, together with the Accrued Retirement Income under the plan of such transferor, to bring his aggregate Accrued Retirement Income for such period of service to January 1, 1956 to the amount computed in accordance with paragraph (a) of this subsection 10.

(d) The Retirement Income of any employee who retired under the provisions of the Plan on any Retirement Date on or before January 1, 1956, or his Provisional Payee, shall be recalculated effective January 1, 1956 in accordance with the provisions of paragraphs (a), (b) and (c) of this subsection 10, except that the date of his retirement shall be substituted for "January 1, 1956" wherever the expression "to January 1, 1956" appears therein and his monthly earnings at the time of his retirement shall be used in lieu of his monthly earnings on January 1, 1955. In no event, however, shall any such retired employee receive an increase of less than $25 per month if he had 30 or more years of service (whether or not Accredited Service) at the date of his retirement. For any such employee who had less than 30 years of such service such minimum increase shall be reduced $1 for each full year less than 30 years.

(e) The recalculation of Retirement Income provided for in this subsection 10 shall not be applicable to any person entitled to receive Retirement Income under the provisions of Section VII of the Plan whose service has terminated prior to January 1, 1956, but such person shall only be entitled to Retirement Income in accordance with the provisions of the Plan in effect at the time his service was terminated.

(f) For the purposes of this subsection 10, an employee of Birmingham Electric Company who, prior to Normal Retirement Date became an employee of the Company by reason of the merger of the former into the latter and continued in employment with the Company and was an active employee of the Company on January 1, 1956, or was retired under the Plan since December 1, 1952, shall be considered to have been transferred to the Company pursuant to the provisions of subsection 5 of Section III.

11. Retirement Income for Service to January 1, 1961. Notwithstanding any other provision of the Plan, Accrued Retirement Income with respect to service prior to January 1, 1961 shall be recomputed in accordance with the following provisions. For the purpose of this subsection 11 the term "transferor" shall mean any company now affiliated or associated with the Company from which an employee was transferred pursuant to subsection 5 of Section III and the term "transferee" shall mean any company now affiliated or associated with the Company to which an employee was transferred from the Company pursuant to subsection 5 of Section III.

(a) Each employee who was in the active service of the Company on January 1, 1961 and who was included in the Plan on that date who had not then reached his Normal Retirement Date shall be entitled, with respect to his Accrued Retirement Income for services prior to January 1, 1961 under the Plan or under the plan of any transferor, to such increase, if any, in the amount of his Accrued Retirement Incomes as will bring the aggregate of his Accrued Retirement Incomes to January 1, 1961 to an amount equal to 1% of his monthly earnings on January 1, 1960 (from the Company or from any transferor) multiplied by his years of Accredited Service from the earlier of (1) the date of the beginning of his Accredited Service under the Plan, or (2) the date of the beginning of his Accredited Service under the plan of any transferor (Accredited Service being determined as under the Plan if resulting in an earlier date) to January 1, 1961. Completed months of service will be counted as fractions of a year for this purpose.

(b) In the event that an employee of the Company then included in the Plan was, prior to January 1, 1961, transferred to a transferee which has a similar provision with respect to service prior to January 1, 1961 applicable to such employee, he will be entitled, under the

Plan, to that part of the aggregate of his Accrued Retirement Incomes as computed in accordance with paragraph (a) of this subsection 11 in the proportion that his Accrued Retirement Income under the Plan for his years of service prior to January 1, 1961 bears to the aggregate of the Accrued Retirement Incomes for such employee for such years of service, as computed before recomputation of his Retirement Income pursuant to paragraph (a) of this subsection 11.

(c) An employee of the Company who meets the requirements of paragraph (a) of this subsection 11 and who was transferred from a transferor shall be entitled to such Retirement Income under the Plan with respect to his service prior to January 1, 1961 as shall be sufficient, together with the Accrued Retirement Income under the Plan of such transferor, to bring his aggregate Accrued Retirement Incomes for such period of service to January 1, 1961 to the amount computed in accordance with paragraph (a) of this subsection 11.

(d) The Retirement Income of any employee who retired under the provisions of the Plan on any Retirement Date on or before January 1, 1961, or his Provisional Payee, and the Accrued Retirement Income of any employee who was in the active service of the Company on January 1, 1961 and who was included in the Plan on that date but who then or prior thereto had reached his Normal Retirement Date, or his Provisional Payee, shall be recalculated effective January 1, 1961 in accordance with the provisions of paragraphs (a), (b) and (c) of this subsection 11, except that the date of his retirement, or his Normal Retirement Date, if earlier, shall be substituted for "January 1, 1961" wherever the expression "to January 1, 1961" appears therein and his monthly earnings at the time of his retirement, or at his Normal Retirement Date, if earlier, shall be used in lieu of his monthly earnings on January 1, 1960. In no event, however, shall any such re-

tired employee or any employee included in the Plan in active service on January 1, 1961 who prior thereto had reached his Normal Retirement Date receive an increase of less than $25 per month (or the actuarial equivalent thereof in the case of early retirement or the designation of a Provisional Payee) if he has or had 30 or more years of service (whether or not Accredited Service) at the date of his retirement. For any such employee who had less than 30 years of such service such minimum increase shall be reduced $1 for each full year less than 30 years.

(e) If on the date as of which it is in this subsection 11 provided that an employee's or retired employee's monthly earnings shall be used for the purpose of a recalculation to be made pursuant to this subsection 11, an employee or retired employee was on authorized leave of absence and he was on such applicable date receiving no earnings or was receiving earnings less than his monthly earnings immediately prior to the grant of his authorized leave of absence, his monthly earnings immediately prior to the time his authorized leave of absence was granted shall be used for the purpose of such recalculation instead of his monthly earnings at the otherwise applicable date specified in this subsection 11.

(f) The recalculation of Retirement Income provided for in this subsection 11 shall not be applicable to any person entitled to receive Retirement Income under the provisions of Section VII of the Plan whose service has terminated prior to January 1, 1961, but such person shall only be entitled to Retirement Income in accordance with the provisions of the Plan in effect at the time his service was terminated.

(g) For the purposes of this subsection 11, an employee of Birmingham Electric Company who, prior to Normal Retirement Date became an employee of the Company by reason of the merger of the former into the latter

and continued in employment with the Company and was an active employee of the Company on January 1, 1961, or was retired under the Plan since December 1, 1952, shall be considered to have been transferred to the Company pursuant to the provisions of subsection 5 of Section III.

12. Retirement Income for Service to January 1, 1966. Notwithstanding any other provision of the Plan, Accrued Retirement Income with respect to service prior to January 1, 1966 shall be recomputed in accordance with the following provisions. For the purpose of this subsection 12 the term "transferor" shall mean any company now affiliated or associated with the Company from which an employee was transferred pursuant to subsection 5 of Section III and the term "transferee" shall mean any company now affiliated or associated with the Company to which an employee was transferred from the Company pursuant to subsection 5 of Section III.

(a) Each employee who was in the active service of the Company on January 1, 1966 and who was included in the Plan on that date and who had not then reached his Normal Retirement Date shall be entitled, with respect to his Accrued Retirement Income for services prior to January 1, 1966 under the Plan or under the plan of any transferor, to such increase, if any, in the amount of his Accrued Retirement Incomes as will bring the aggregate of his Accrued Retirement Incomes to January 1, 1966 to an amount equal to 1% of his monthly earnings on January 1, 1965 (from the Company or from any transferor) multiplied by his years of Accredited Service from the earlier of (1) the date of the beginning of his Accredited Service under the Plan, or (2) the date of the beginning of his Accredited Service under the plan of any transferor (Accredited Service being determined as under the Plan if resulting in an earlier date) to January 1, 1966. Completed months of service will be counted as fractions of a year for this purpose.

(b) In the event that an employee of the Company then included in the Plan was, prior to January 1, 1966, transferred to a transferee which has a similar provision with respect to service prior to January 1, 1966 applicable to such employee, he will be entitled, under the Plan, to that part of the aggregate of his Accrued Retirement Incomes as computed in accordance with paragraph (a) of this subsection 12 in the proportion that his Accrued Retirement Income under the Plan for his years of service prior to January 1, 1966 bears to the aggregate of the Accrued Retirement Incomes for such employee for such years of service, as computed before recomputation of his Retirement Income pursuant to paragraph (a) of this subsection 12.

(c) An employee of the Company who meets the requirements of paragraph (a) of this subsection 12 and who was transferred from a transferor shall be entitled to such Retirement Income under the Plan with respect to his service prior to January 1, 1966 as shall be sufficient, together with the Accrued Retirement Income under the Plan of such transferor, to bring his aggregate Accrued Retirement Incomes for such period of service to January 1, 1966 to the amount computed in accordance with paragraph (a) of this subsection 12.

(d) The Retirement Income of any employee who retired under the provisions of the Plan on any Retirement Date on or before January 1, 1966, or his Provisional Payee, and the Accrued Retirement Income of any employee who was in the active service of the Company on January 1, 1966 and who was included in the Plan on that date but who then or prior thereto had reached his Normal Retirement Date, or his Provisional Payee, shall be recalculated effective January 1, 1966 in accordance with the provisions of paragraphs (a), (b) and (c) of this subsection 12, except that the date of

his retirement, or his Normal Retirement Date, if earlier, shall be substituted for "January 1, 1966" wherever the expression "to January 1, 1966" appears therein and his monthly earnings at the time of his retirement, or at his Normal Retirement Date, if earlier, shall be used in lieu of his monthly earnings on January 1, 1965.

(e) The Retirement Income of the Provisional Payee of an employee which is payable in accordance with subsection 2 of Section VI by reason of the death of the employee prior to retirement shall be recalculated effective January 1, 1966 in accordance with the provisions of paragraphs (a), (b) and (c) of this subsection 12, except that the date of his death (or his Normal Retirement Date, if earlier) shall be substituted for January 1, 1966, wherever the expression "to January 1, 1966" appears therein and his monthly earnings at the time of his death (or his Normal Retirement Date, if earlier) shall be used in lieu of his monthly earnings of January 1, 1965.

(f) For the purpose of a recalculation of Retirement Income to be made in accordance with this subsection 12 with respect to (i) an employee who retired on an Early Retirement Date on or before January 1, 1966, or his Provisional Payee, or (ii) with respect to the Provisional Payee of an employee who died on or before January 1, 1966 and prior to his retirement and who is referred to in the preceding paragraph (e), the amount of the Retirement Income payable at Early Retirement Date in respect of an employee who retired on his Early Retirement Date shall be recomputed in accordance with the provisions of subsection 3 of Section IV, and, in respect of an employee who died before retirement, his Accrued Retirement Income at the date of his death shall be recomputed in accordance with the provisions of subsection 2 of Section VI.

(g) If on the date as of which it is in this subsection 12 provided that an employee's or retired employee's monthly earnings shall be used for the purpose of a recalculation to be made pursuant to this subsection 12, an employee or retired employee was on authorized leave of absence and he was on such applicable date receiving no earnings or was receiving earnings less than his monthly earnings immediately prior to the grant of his authorized leave of absence, his monthly earnings immediately prior to the time his authorized leave of absence was granted shall be used for the purpose of such recalculation instead of his monthly earnings at the otherwise applicable date specified in this subsection 12.

(h) The recalculation of Retirement Income provided for in this subsection 12 shall not be applicable to any person entitled to receive Retirement Income under the provisions of Section VII of the Plan whose service has terminated prior to January 1, 1966, but such person shall only be entitled to Retirement Income in accordance with the provisions of the Plan in effect at the time his service was terminated.

(i) For the purpose of this subsection 12, an employee of Birmingham Electric Company who, prior to Normal Retirement Date became an employee of the Company by reason of the merger of the former into the latter and continued in employment with the Company and was an active employee of the Company on January 1, 1966, or was retired under the Plan since December 1, 1952, shall be considered to have been transferred to the Company pursuant to the provisions of subsection 5 of Section III.

13. Retirement Income for Service Prior to January 1, 1971. Retirement Income payable on and after January 1, 1971 to an employee who retired pursuant to the Plan before January 1, 1971 (or to his Provisional Payee) will be recalculated to in-

crease the amount thereof by an amount ranging from a minimum of 3% to a maximum of 15% in accordance with the following schedule.

Year in which early or normal retirement occurred:	Percentage Increase:
1970	3%
1969	6%
1968	9%
1967	12%
1966 and prior years	15%

A similar adjustment, based on the date of an employee's death, rather than retirement date, will be made in respect of Retirement Income which is payable on and after January 1, 1971 where a Provisional Payee election was in effect when an employee died while in service prior to January 1, 1971 and prior to his retirement.

The recalculation of Retirement Income provided for in this subsection 13 shall not be applicable to any person entitled to receive Retirement Income under the provisions of Section VII of the Plan whose service has terminated prior to January 1, 1971, but such person shall only be entitled to Retirement Income in accordance with the provisions of the Plan in effect at the time his service was terminated.

SECTION VI. PROVISIONAL PAYEE

1. An employee who desires to have his Retirement Income payable on or after the effective date of the designation of a Provisional Payee as hereinafter provided actuarially adjusted to provide, at his option, either

(a) a reduced amount payable to him for his lifetime with the provision that such reduced amount will be continued after his death to his spouse as Provisional Payee until the death of such Provisional Payee, or

(b) a reduced amount (greater than the amount in (a) above) payable to him for his lifetime with the provision that one-half of such reduced amount will be continued after his death to his spouse as Provisional Payee until the death of such Provisional Payee,

may, subject to the conditions outlined below, and in lieu of any other form or method of payment of Retirement Income, designate such spouse as a Provisional Payee and at the same time elect to have payments made in accordance with the provisions of this Section.

2. Adjustment of Retirement Income by reason of the designation of a Provisional Payee in the event of an employee's retirement on or after his 55th birthday will be based on the Retirement Income payable on his Early Retirement Date or Retirement Income payable on his Normal Retirement Date, as the case may be. If an employee who has designated a Provisional Payee dies prior to his retirement but after the effective date of his Provisional Payee designation, there will be payable to his Provisional Payee for life Retirement Income in a reduced amount in accordance with the employee's election of payments to be made to his Provisional Payee after the death of the employee under (a) or (b), as the case may be, of subsection 1 of this Section VI. The reduced amount payable to the Provisional Payee shall be based on the employee's Accrued Retirement Income at the date of his death actuarially adjusted.

Adjustments of Retirement Income shall be made in accordance with such actuarial tables as may be adopted by the Retirement Board and in use at the time of the employee's death or at his Early or Normal Retirement Date, as the case may be.

3. An election of payment and designation of a Provisional Payee in accordance with this Section shall be made in writing at the same time on a form prescribed by the Retirement Board and delivered to it. The election and designation shall specify its effective date which shall not be sooner than one year from the date the executed form is received by the Retirement Board or the employee's 55th birthday, whichever is later. The effec-

tive date may not be later than the date of commencement of payments in accordance with this Section VI.

An election of payment to be made in accordance with subsection 1(a) or (b) of this Section VI may be changed from 1(a) to 1(b) or vice versa by an employee provided the written election of the change specifies an effective date which shall not be sooner than one year from the date the Retirement Board receives the written election of change and provided the effective date of the change shall be prior to the date of commencement of payments in accordance with this Section VI. If an election of payment and designation has become effective at the time the election to change is received by the Retirement Board, or thereafter becomes effective, the original election of payment shall remain effective until the new election of payment shall become effective. To the extent that the new method of payment shall afford the employee changed protection in the event of his death after the effective date of the new election and prior to retirement, his Accrued Retirement Income shall be actuarially adjusted to reflect such changed protection.

If an employee's service terminates for any reason (including early retirement) prior to the effective date of an election and designation, the election and designation made pursuant to this Section shall be inoperative and the regular provisions of the Plan shall again become applicable as if a Provisional Payee had not been designated.

4. An election and designation made pursuant to this Section shall be inoperative and the regular provisions of the Plan shall again become applicable as if a Provisional Payee had not been designated if, prior to the commencement of any payments in accordance with this Section, (a) an employee's Provisional Payee shall die, except as provided in subsection 5 of this Section VI, or (b) the employee and the Provisional Payee shall be divorced, the divorce shall have become final and the Retirement Board shall have received the written request of the employee that the election and designation be inoperative, or (c) the Retirement Board shall have received the written election of the employee to rescind his election of payment and

designation of a Provisional Payee. If such election to rescind is made by the employee his Accrued Retirement Income shall be actuarially reduced to reflect the protection afforded the employee by the Provisional Payee designation during the period from its effective date to the date of the Retirement Board's receipt of the employee's election to rescind.

5. If the Provisional Payee dies after the employee's Normal Retirement Date but prior to the employee's Deferred Retirement Date, upon retirement the employee will be entitled to receive the reduced Retirement Income he would have received in accordance with this Section had he retired on his Normal Retirement Date.

6. If an employee who has made an election and designation in accordance with this Section terminates his services on or after the effective date of such designation under such circumstances as to entitle him to payment of Retirement Income in accordance with Section VII of the Plan (but for his election and designation in accordance with this Section), and such employee shall die prior to his Normal Retirement Date, there will be payable to his Provisional Payee for life Retirement Income in a reduced amount in accordance with the employee's election of payments to be made to his Provisional Payee after the death of the employee under (a) or (b), as the case may be, of subsection 1 of this Section VI. The reduced amount payable to the Provisional Payee shall be based upon the employee's Accrued Retirement Income at the date of the termination of his service actuarially adjusted. If the employee shall be alive on his Normal Retirement Date, a reduced amount of Retirement Income, determined in accordance with this Section VI, based upon his Accrued Retirement Income at the date of the termination of his service will be payable to him commencing on his Normal Retirement Date, with payments in the same or reduced amount to be continued to his Provisional Payee for life after the employee's death in accordance with his election. Payments in accordance with this subsection 6 will only be made if application to the Company is made within 5 years after the death of the employee, if he shall die prior to his

Normal Retirement Date, or within 5 years after his Normal Retirement Date, if he shall be alive on that date.

7. If without any election and designation made in accordance with this Section VI an amount would have been added to any monthly payment of Retirement Income to conform to the minimum Retirement Income provisions of subsection 4(a) of Section V, then such amount shall be added to the reduced amount payable to an employee who has a Provisional Payee, but after the death of such employee the payments to his Provisional Payee shall be limited to such reduced amount of Retirement Income without any addition thereto.

8. If an employee included in the Plan who is also included in the Retirement Income Plan for Employees of Birmingham Electric Company elects by his designation and election filed pursuant to this Section VI to have his Retirement Income under the Plan actuarially adjusted and paid in accordance with the provisions of this Section VI, he shall, if he further makes the election and executes the waiver provided in this subsection 8, be entitled to have added to his Accrued Retirement Income under the Plan an amount equal to his Accrued Retirement Income under the Retirement Income Plan for Employees of Birmingham Electric Company. The aggregate of such Accrued Retirement Incomes shall be adjusted and paid in accordance with the provisions of this Section VI. An election made pursuant to this subsection shall be irrevocable and shall be made on a form prescribed by the Retirement Board and filed with it at the time the employee's designation and election is filed. It shall be a condition of such election that an employee waive and forfeit any right to the payment of any Accrued Retirement Income to which he would otherwise be entitled under the Retirement Income Plan for Employees of Birmingham Electric Company.

9. The amendments to the Plan to be effective as of January 1, 1971, are subject to the receipt by the Company of a favorable letter of determination of the Internal Revenue Service, and the approval of the amendments by the stockholders of the Company. Notwithstanding the existence of these conditions, prior to August 1, 1971, an election and designation of Provisional Payee may be made or changed, as may an election of payments, in accordance with the provisions of this Section VI, amended effective as of January 1, 1971, subject to all of the provisions of this subsection 9.

(a) Any election of payment and designation of a Provisional Payee or change made in accordance with this subsection shall be received by the Retirement Board on or prior to August 1, 1971.

(b) The effective date of the election and designation of the Provisional Payee shall be as specified therein, which may not be sooner than the employee's 55th birthday, nor sooner than the date the executed form is received by the Retirement Board and may not be later than a date specified in the form which date may not be later than the date of commencement of payments in accordance with Section VI.

(c) Prior to the date of receipt by the Retirement Board of the executed form referred to in (b) the employee shall have attained his 54th birthday but not his Normal Retirement Date.

(d) An election of payment to be made in accordance with subsection 1(a) or (b) of Section VI may be changed as provided in subsection 3 except that the effective date of such change may be less than one year from the date the Retirement Board receives the written election of change but not later than the date of commencement of payments in accordance with Section VI.

(e) If on or prior to August 1, 1971, the Plan as amended effective as of January 1, 1971, shall be declared effective as of the latter date any election of payment and designation of a Provisional Payee or a change made in accordance with this subsection, shall be given effect in accordance with its terms. Pending such declaration by the Company, no payment shall be made in accordance with any such election and designation or change made pursuant to this subsection 9.

(f) If on or prior to August 1, 1971, the Plan as amended effective as of January 1, 1971, shall not be declared effective by the Company, any election of payment and designation or

change made in accordance with this subsection shall be null and void and of no force and effect and any payment to which the employee or his Provisional Payee may be entitled in accordance with the Plan shall be only such payment to which the employee or his Provisional Payee shall be entitled in accordance with the provisions of the Plan as they existed on December 31, 1970, without regard to the amendments proposed to be made effective as of January 1, 1971.

SECTION VII. TERMINATION OF SERVICE

If the services of an employee included in the Plan terminate for any reason other than death or transfer to an affiliated or associated company as provided by subsection 5 of Section III or retirement as provided by Section IV, and if such employee has had at least 20 years of service with the Company (including service with companies or properties now affiliated or associated with the Company, service with companies or properties heretofore so affiliated or associated prior to the date of severance of such affiliation or association and service with Birmingham Electric Company), whether or not Accredited Service, or has had at least 15 years of such service and has attained the age of 50 at the time of such termination he will receive, commencing at Normal Retirement Date, Retirement Income equal to his Accrued Retirement Income at the date of the termination of such service provided that he makes application to the Company for the payment of such Retirement Income at Normal Retirement Date or within 5 years thereafter. If such employee has had less than 20 years of such service or had not attained the age of 50 having had at least 15 years of such service, he shall have no rights to any Retirement Income under the Plan based upon his service prior to such termination.

For the purpose of this Section VII, service with the Company shall include active service with the Armed Forces of the United States if the employee enters active service or training in such Armed Forces directly from the employ of the Company

and after discharge or release therefrom under honorable conditions returns within a reasonable time to the employ of the Company and remains in such employ for a period of one year.

In no event shall such an employee be entitled to any Retirement Income until Normal Retirement Date nor shall the provisions as to minimum Retirement Income in subsection 4 of Section V be applicable to such an employee. The designation of any Provisional Payee by such an employee shall become inoperative upon the termination of his services unless such termination occurs within 10 years prior to Normal Retirement Date and either (a) the designation of the Provisional Payee was made and accepted prior to January 1, 1961 and such designation has not been rescinded, or (b) the designation of the Provisional Payee was made after January 1, 1961 and such termination of service occurred on or after the effective date of the election and designation made in accordance with Section VI.

Any person entitled to receive Retirement Income under the provisions of this Section VII shall only be entitled to Retirement Income in accordance with the provisions of the Plan in effect at the time his service was terminated.

SECTION VIII. NON-ALIENATION OF BENEFITS

No benefit under the Plan shall be subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance or charge, and any attempt so to anticipate, alienate, sell, transfer, assign, pledge, encumber or charge the same shall be void, nor shall any such benefit be in any manner liable for or subject to the debts, contracts, liabilities, engagements or torts of the person entitled to such benefit.

If any employee or retired employee or any Provisional Payee under the Plan is adjudicated bankrupt or attempts to anticipate, alienate, sell, transfer, assign, pledge, encumber or charge any benefit under the Plan, except as specifically provided in the Plan, then such benefit shall cease and terminate and in that event the Retirement Board shall hold or apply the same or any part thereof to or for the benefit of such employee

or retired employee or Provisional Payee in such manner as the Retirement Board may think proper.

SECTION IX. LIMITATION OF RIGHTS OF THE EMPLOYEE

This Plan shall not be deemed to constitute a contract between the Company and any employee or to be a consideration for, or condition of, the employment of any employee. Nothing contained in this Plan shall be deemed to give any employee the right to be retained in the service of the Company or to interfere with the right of the Company to discharge or retire any employee at any time. Inclusion under the Plan will not give any employee any right or claim to a Retirement Income except upon reaching Normal Retirement Date or Early Retirement Date and no employee or Provisional Payee shall be entitled to any right or claim to a Retirement Income except to the extent such right is specifically fixed under the terms of the Plan and there are funds available therefor in the hands of the Trustee.

SECTION X. CONTRIBUTIONS

1. Contributions Generally. All contributions to provide the Retirement Incomes under the Plan will be made by the Company and no contributions will be required of the employees. All contributions shall be made to the Trustee under the Trust Agreement provided for in Section XII. The contributions of the Company shall be payable at such intervals as may be agreed upon by the Company and the Retirement Board, and each payment shall consist of an amount equal to the total of

> Contribution to cover the Future Service cost of the Plan, herein called the "Future Service Contribution",
>
> Contribution to cover the Past Service cost, herein called the "Past Service Contribution",

with proper adjustments to reflect minimum Retirement Incomes.

2. Future Service Contributions. The Future Service Contributions shall be computed by the actuary for the Retirement Board. Thereupon the actuary shall certify to the Retirement Board his computation as to the Future Service Contributions, and such computation shall determine the Future Service Contributions payable by the Company.

3. Past Service Contributions. The actuary for the Retirement Board shall compute the total Past Service cost of the Plan on the basis of the present value of all Past Service Retirement Income which may become payable under the Plan. The Past Service cost shall thereafter be periodically adjusted by the actuary. The actuary shall certify to the Retirement Board his computation as to the Past Service Contributions, and such computation shall determine the Past Service Contributions payable by the Company.

It is contemplated that the Past Service cost and the increased cost by reason of any amendment after the effective date of the Plan for service prior to the date of said amendment shall be paid by contributions made periodically by the Company. The Company hopes and expects to complete such contributions, but such completion is not guaranteed, subject to the provisions of Section XV hereof.

4. Expenses. All expenses of the Plan shall be paid by the Company, except that investment expenses (including brokerage costs, transfer taxes, shipping expenses and charges of correspondent banks of the Trustee) and any taxes which may be levied against the Trust Fund shall be charged to the Trust Fund.

SECTION XI. ADMINISTRATION OF PLAN

The general administration of the Plan shall be placed in a Retirement Board of five members who shall be appointed from time to time by the Board of Directors to serve at the pleasure of the Board of Directors.

Any person appointed a member of the Retirement Board shall signify his acceptance by filing written acceptance with

the Board of Directors. Any member of the Retirement Board may resign by delivering his written resignation to the Board of Directors, and such resignation shall become effective at delivery or at any later date specified therein.

The members of the Retirement Board shall elect a Chairman from their number, and a Secretary who may be but need not be one of the members of the Retirement Board, and shall designate an actuary to act in actuarial matters relating to the Plan. They may appoint from their number such committees with such powers as they shall determine, may authorize one or more of their number or any agent to make any payment in their behalf, or to execute or deliver any instrument except that a requisition for funds from the Trustees shall be signed by two members of the Retirement Board, and may employ counsel and agents and such clerical, medical and accounting services as they may require in carrying out the provisions of the Plan.

The Retirement Board shall hold meetings upon such notice, at such place or places, and at such time or times as they may from time to time determine.

A majority of the members of the Retirement Board at the time in office shall constitute a quorum for the transaction of business. All resolutions or other actions taken by the Retirement Board at any meeting shall be by the vote of a majority of the Retirement Board at the time in office.

No member of the Retirement Board who is also an employee of the Company shall receive any compensation from the Plan for his services as such. No bond or other security need be required of any member in any jurisdiction.

Subject to the limitations of the Plan, the Retirement Board from time to time shall establish rules for the administration of the Plan and the transaction of its business. The determination of the Retirement Board as to any question arising under the Plan shall be conclusive.

The Retirement Board shall adopt from time to time standards for use in all actuarial calculations required in connection with the Plan, and shall establish the rates of contribution on

account of the Plan as provided in Section X. As an aid to the Retirement Board in adopting tables and in fixing the rates of contribution payable under the Plan, the actuary designated by the Retirement Board shall make annual actuarial valuations with respect to the operation and administration of the Plan, and shall certify to the Retirement Board the tables and rates of contribution which he would recommend for use by the Retirement Board.

The Retirement Board shall maintain accounts showing the fiscal transactions of the Plan, and shall keep in convenient form such data as may be necessary for actuarial valuations with respect to the operation and administration of the Plan. The Retirement Board shall prepare annually a report showing in reasonable summary the financial condition of the Trust Fund and giving a brief account of the operation of the Plan for the past year, and any further information which the Board of Directors may require. Such report shall be submitted to the Board of Directors and shall be filed in the office of the Secretary of the Retirement Board.

The members of the Retirement Board and the Company and its officers and directors shall be entitled to rely upon all tables, valuations, certificates and reports furnished by any actuary designated by the Retirement Board, upon all certificates and reports made by any accountant selected or approved by the Board of Directors, and upon all opinions given by any legal counsel selected or approved by the Board of Directors, and the members of the Retirement Board and the Company and its officers and directors shall be fully protected in respect of any action taken or suffered by them in good faith in reliance upon any such actuary, accountant or counsel, and all action so taken or suffered shall be conclusive upon each of them and upon all employees, retired employees, former employees and Provisional Payees.

SECTION XII. MANAGEMENT OF FUNDS

1. Trust Fund. All assets of the Plan shall be held as a special trust for use in accordance with the Plan.

The funds of the Plan shall be held by Bankers Trust Company, New York, as Trustee, or by a successor trustee appointed from time to time by the Board of Directors, in trust, under a Trust Agreement dated as of July 1, 1944, as amended and supplemented. The Trust Agreement may from time to time be amended in the manner therein provided.

2. *Disbursement of Funds.* Subject to the provisions of the Trust Agreement the Retirement Board shall determine the manner in which the funds of the Plan shall be disbursed pursuant to the Plan, including the form of voucher or warrant to be used in making disbursements and the due qualification of persons authorized to approve and sign the same. The responsibility for the retention and investment of the Trust Fund shall lie with the Trustee and not with the Retirement Board.

3. *Rights in Trust Fund.* Under no circumstances shall amounts of money or other things of value contributed by the Company to the Plan, or any part of the corpus or income of the fund held by the Trustee under the Plan, be recoverable by the Company from the Trustee or from any employee, retired employee or Provisional Payee, or be used for, or diverted to, purposes other than for the exclusive benefit of the employees, retired employees and Provisional Payees covered hereunder; *provided, however,* that, if after satisfaction of all liabilities of the trust with respect to employees, retired employees and Provisional Payees under the Plan, there is any balance remaining, the Trustee shall return such balance to the Company.

SECTION XIII. TERMINATION OF THE PLAN

1. Subject to the provisions of Section XV hereof the Plan may be *terminated* at any time by action of the Board of Directors of the Company. Upon such termination or upon complete discontinuance of contributions under the Plan, the Trust Fund then held by the Trustee shall be used and applied for the benefit of employees of the Company who have been retired under the Plan, employees of the Company who at the date of

the termination of the Plan are included in the Plan, former employees who at the date of the termination of their employment had at least 20 years of service or had at least 15 years of service and attained the age of 50 as described in the first paragraph of Section VII and former employees who have transferred to an affiliated or associated company in accordance with subsection 5 of Section III and are still in the employ of or receiving a retirement income from such company (including their Provisional Payees, if any) in the following order:

> First: For the benefit of such retired employees and such employees and former employees who have reached Normal Retirement Date, upon the basis of their Retirement Incomes, and
>
> Second: As to any balance remaining, for the benefit of all such employees and former employees who are not provided for pursuant to paragraph First of this Section, upon the basis of their Accrued Retirement Incomes at the date of termination of the Plan,

in amounts as to each group in the order stated proportionate to, but not in excess of, the actuarially determined present values at the date of termination of the Plan of their respective Retirement Incomes and Accrued Retirement Incomes. Provision pursuant to either of the foregoing paragraphs of this Section may be made, in the discretion of the Retirement Board, by the purchase of annuities, or by continuing the Trust Fund in existence, and making provision therefrom of Retirement Incomes, or by immediate distribution from the Trust Fund. If after satisfaction of all liabilities of the Trust with respect to employees, retired employees and Provisional Payees under the Plan there is any balance remaining, the Trustee shall return such balance to the Company.

2. Notwithstanding any other provisions in this Plan to the contrary (other than subsections 4 and 5 of this Section XIII) the benefits for the 25 highest paid employees as of January 1, 1966, including any such employees who were not included in the Plan at that time but who later were included but exclud-

ing any employee whose annual benefits provided by employer contributions prior to that date and during the ensuing ten years, based on his rate of compensation on that date, could not exceed $1,500, will be subject to the conditions set forth in subsection 3 hereof.

3. If the Plan is terminated or the full current costs thereof have not been met at any time within 10 years after January 1, 1966, the benefits which any individual employee referred to in subsection 2 above may thereafter receive until the full current costs of the Plan have been met (unless he shall be entitled to greater benefits in accordance with the provisions of subsections 4 and 5 of this Section XIII) shall be limited to the benefits provided by employer contributions not exceeding the largest of the following three amounts:

(a) $20,000;

(b) The employer contributions (or funds attributable thereto) which would have been applied to provide benefits for such employee if the Plan had been continued without the amendment effective on January 1, 1966; and

(c) The sum of (a) the employer contributions (or funds attributable thereto) which would have been applied to provide benefits for the employee under the Plan (without the amendment effective on January 1, 1966) if it had been terminated on December 31, 1965, and (b) an amount computed by multiplying the number of years for which the full current costs of the Plan after December 31, 1965, are met by (A) 20% of the average regular annual compensation of such employee during the last 5 years of his service with the Company (if less than 5 years, then during such lesser period of service) immediately preceding (i) the date of termination of the Plan or failure to meet the full current costs thereof, or (ii) if earlier, the date of his termination of employment with the Company or his retirement under the Plan, or (B) $10,000, whichever is less.

4. Notwithstanding any other provisions in this Plan to the contrary, the benefits for the 25 highest paid employees of the Company as of January 1, 1971, including any such employees who are not included in the Plan at that time but who later are included but excluding any employee whose annual benefits provided by employer contributions prior to that date and during the ensuing 10 years, based on his rate of compensation on that date, could not exceed $1,500, will be subject to the conditions set forth in subsection 5 hereof.

5. If the Plan is terminated or the full current costs thereof have not been met at any time within 10 years after January 1, 1971, the benefits which any individual employee referred to in subsection 4 above may thereafter receive until the full current costs of the Plan have been met shall be limited to the benefits provided by employer contributions not exceeding the largest of the following three amounts:

(a) $20,000;

(b) The employer contributions (or funds attributable thereto) which would have been applied to provide benefits for such employee if the Plan had been continued without the amendment effective on January 1, 1971; and

(c) The sum of (a) the employer contributions (or funds attributable thereto) which would have been applied to provide benefits for the employee under the Plan (without the amendment effective on January 1, 1971) if it had been terminated on December 31, 1970, and (b) an amount computed by multiplying the number of years for which the full current costs of the Plan after December 31, 1970, are met by (A) 20% of the average regular annual compensation of such employee during the last 5 years of his service with the Company (if less than 5 years, then during such lesser period of service) immediately preceding (i) the date of termination of the Plan or failure to meet the full current costs thereof, or (ii) if earlier, the date of his termination of employment with

the Company or his retirement under the Plan, or (B) $10,000, whichever is less.

6. The term "full current costs" as used in subsections 3 and 5 of this Section XIII shall have the meaning ascribed to it in Income Tax Regulations Section 1.401-4(b) (2) (vi) presently in effect or as amended from time to time.

7. The limitations contained in subsections 2, 3, 4 and 5 of this Section XIII shall restrict neither (i) the current payment of full Retirement Income prior to the termination of the Plan (or a failure to meet full current costs) nor (ii) the payment of full Retirement Income to an employee's Provisional Payee at any time if such payment shall have commenced prior to the termination of the Plan (or a failure to meet full current costs).

8. Any funds released by operation of subsections 2, 3, 4 or 5 of this Section XIII shall become a part of the assets available for allocation under subsection 1 of this Section XIII among employees whose benefits are not restricted by the provisions of said subsections 2, 3, 4 and 5.

9. Subsections 2, 3, 4 and 5 of this Section XIII are included in the Plan to conform to the requirements of Income Tax Regulations Section 1.401-4(c) and shall cease to be effective at such time as the provisions of such Section of the Regulations as amended from time to time or any substitute therefor are no longer effective or applicable.

SECTION XIV. AMENDMENTS

Subject to the provisions of Section XV hereof, the Plan may be amended or modified at any time by the Board of Directors, *provided, however,* that, in no event, at any time prior to the satisfaction of all liabilities of the trust with respect to employees and retired employees and Provisional Payees under the Plan, shall any part of the corpus or income of the trust be used for, or diverted to, purposes other than for the exclusive benefit of employees or retired employees or Provisional Payees under the Plan; *and provided further* that no amendment or modification which will substantially increase the cost of the Plan

will be made by the Board of Directors without approval, at a meeting of the stockholders duly called for that purpose, by the vote of a majority of the stock present and entitled to vote at such meeting.

Such amendments and modifications (without limiting the generality of the foregoing) may, among other things, make any changes in the Plan which may become appropriate if, for any reason, the Company should in the future find it necessary or desirable not to complete payment of the Past Service costs of the Plan in the manner and within the period now contemplated or should find it necessary or desirable to reduce the amounts of Future Service Contributions to be paid by the Company after such amendment or modification. Such amendments and modifications may also (without limiting the generality of the foregoing), make any changes necessary or desirable to make the costs of the Plan eligible for tax deduction or to make the income of the Trust Fund exempt from taxation or to bring the Plan into conformity or compliance with governmental regulations.

SECTION XV. SPECIAL PROVISIONS

The Company intends that the Plan (including the trust forming a part thereof) shall be a pension plan of an employer for the exclusive benefit of his employees or their beneficiaries, as provided for in Section 401 of the Internal Revenue Code of 1954, as amended, and as may be provided for in any similar provisions of subsequent revenue laws, and that the trust shall qualify as an Employees' Trust under said Section 401 of the Internal Revenue Code which shall be exempt under Section 501(a) and any similar provisions of subsequent revenue laws, as a trust forming part of such a Plan.

Notwithstanding the provisions of Sections V, XIII and XIV, the Plan as amended as of January 1, 1971, shall not be subject to termination or amendment prior to January 1, 1976, except that the continuance of the Plan is conditioned upon the continued allowability in full to the Company as deductions for

Federal Income Tax purposes of the costs of the Plan and the continued tax-exempt status of the income of the Trust Fund and such Plan shall be subject to any changes necessary or desirable to make such costs of the Plan eligible for tax deductions or to make the income of the Trust Fund exempt from taxation or to bring the Plan into conformity or compliance with governmental regulations or, in accordance with the right reserved to the Company in the last paragraph of subsection 2 of Section V, to substitute in paragraphs (a) and (b) of subsection 2 of Section V a larger amount in place of $9,000, or to include in the Plan, if and to the extent and in the manner the Company so desires, any employees of the Company who were employees of properties acquired by the Company by purchase, consolidation, merger or otherwise on the same terms as if they had been employed by the Company.

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Supreme Court, U. S.
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No. 76-451

In the Supreme Court of the United States

OCTOBER TERM, 1976

ALABAMA POWER COMPANY, PETITIONER

v.

RAYMOND E. DAVIS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

ROBERT H. BORK,
Solicitor General,
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Washington, D.C. 20530.

In the Supreme Court of the United States

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ALABAMA POWER COMPANY, PETITIONER

v.

RAYMOND E. DAVIS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

The question presented is whether under the reemployment rights provisions of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. (Supp. V) 2021 *et seq.* ("Act"),[1] a returning veteran is entitled to credit for his time in military service in the computation of the pension benefit provided by his employer.

1. Respondent, Mr. Raymond E. Davis, a World War II veteran represented by the Department of Justice pursuant to 38 U.S.C. (Supp. V) 2022 (then Section 9(d) of

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[1]Congress has periodically reenacted without significant change the veterans' reemployment provisions at issue here since their original enactment in 1940. See *Foster* v. *Dravo Corp.*, 420 U.S. 92, 96 and n. 6. They have recently been codified in 38 U.S.C.

the Selective Service Act of 1948, 62 Stat. 616, as amended, 50 U.S.C. App. 459(d)), sued his former employer, Alabama Power Company, seeking credit under the Act for his military service in the computation of his pension benefit.

Mr. Davis had been an employee of Alabama Power Company for approximately six and one-half years when he left its employ in March 1943 for World War II military service. After two years and seven months of military service, he was honorably discharged in October 1945 and was reinstated to his former position with Alabama Power Company. Mr. Davis retired from Alabama Power on June 1, 1971. In computing Mr. Davis' pension benefit, the Company failed to credit Mr. Davis with the two years and seven months he spent in military service. Under the Company's pension plan, the amount of an employee's monthly benefit is computed by multiplying approximately one percent of his last month's earnings by his total years of service (Plan Section V. 4(c), Pet. App. 50a-52a). Under this formula, Mr. Davis receives a monthly benefit of $198.95, which is $17.11 less than he would receive had his years of military service been counted.[2]

(Supp. V) 2021 *et seq.* by the Vietnam Era Veterans' Readjustment Assistance Act of 1974, Pub. L. 93-508, 88 Stat. 1578, 1594.

[2]Alabama Power Company's pension plan provides benefits to employees who have been continuously employed for specific periods of time, Plan Section III.4, Pet. App. 41a-42a. The plan contains a fifteen or twenty year vesting period, Plan Section VII, Pet. App. 69a-70a. Pension credit accrues only to "full time regular employees," Section II.1, Pet. App. 37a-38a, which the parties have stipulated to mean employees who work 40 hours per week for an indefinite period of time. See Pet. App. 7a.

Military service is not considered a break in service, Section III.3(a), Pet. App. 40a, and is counted for purposes of the vesting requirement, Section VII, Pet. App. 69a-70a, but it is not included in computing the amount of the monthly benefit except in circumstances not applicable to Mr. Davis. Plan Section III.3, Pet. App. 40a. See also Pet. 4, n. 2.

This suit was filed on December 20, 1972. The complaint alleged that the Act required Alabama Power Company to credit Mr. Davis with his two years and seven months of World War II military service in the calculation of the amount of the pension benefit due at his retirement on June 1, 1971. The district court ruled that the pension benefit constituted a "seniority" right and that the Act required the Company to credit Mr. Davis' time in military service in the computation of his pension. 383 F. Supp. 880 (Pet. App. 4a-28a). The court found that the pension benefit was primarily based on the "total time of employment," not on total amount of work performed (Pet. App. 12a), and that the purpose of the pension benefit was to promote personnel stability. Therefore, it concluded the "real nature" of the benefit made it a perquisite of seniority (Pet. App. 14a). A divided panel of the court of appeals affirmed on the basis of the district court's opinion (Pet. App. 1a).

1. Petitioner contends that the additional seniority to which the Act entitles a veteran for his military service does not entitle him to credit, in the determination of his pension benefits, for the period of his military service. The court of appeals correctly held, however, on the basis of the district court's comprehensive opinion, that pension benefits are perquisites of seniority, and that military service must therefore be credited in computing them. This follows, we believe, from *Accardi* v. *Pennsylvania R. Co.*, 383 U.S. 225, which held that the seniority benefits to which a veteran is entitled are not

determined by narrow technical definitions or collective bargaining agreements, but by the real nature of the employment rights at issue, examined in the light of the beneficial intent of Congress in adopting the Act. Cf. *Palmarozzo* v. *Coca-Cola Bottling Co. of New York*, 490 F. 2d 586, 591-592 (C.A. 2). We recognize, however, that the decision below is basically inconsistent with decisions of the Third and Tenth Circuits which have held that pension benefits are not perquisites of seniority under the Act. *Litwicki* v. *Pittsburgh Plate Glass Ind., Inc.*, 505 F. 2d 189 (C.A. 3); *Jackson* v. *Beech Aircraft Corp.*, 517 F. 2d 1322 (C.A. 10).[3] Moreover, in *Smith* v. *Industrial Employers & Distributors Association*, C.A. 9, Nos. 75-1327 and 75-1333 (decided November 23, 1976), affirming 385 F. Supp. 1281 (N.D. Cal.), the Ninth Circuit has adopted another approach which entitles a veteran to credit for military service in the computation of pension benefits awarded for employment prior to establishment of a pension plan, but excludes such service if it occurred after establishment of the plan.

Although the government and respondent believe that the decision below is correct, we have been authorized by respondent to urge that the Court grant the petition. The circuits have adopted inconsistent analyses of the issue, and have reached inconsistent results with respect to pension plans that are similar in significant respects.[4]

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[3]District courts in the Sixth and Ninth Circuits which have considered this issue have reached opposite results. *LaPinta* v. *Ohio Crankshaft*, 77 CCH Labor Cases par. 11,156 (N.D. Ohio), appeal pending, C.A. 6, No. 76-1158; *Smith* v. *Industrial Employers & Distributors Association*, 385 F. Supp. 1281 (N.D. Cal.), affirmed, C.A. 9, Nos. 75-1327 and 75-1333 (decided November 23, 1976).

[4]For example, under the Ninth Circuit's approach in *Smith*, Mr. Davis would presumably be entitled to credit for only sixteen of his thirty months of military service because Alabama Power instituted its pension plan while Mr. Davis was in the Armed Forces. Under the approach apparently adopted by the Third and Tenth Circuits, Mr. Davis would probably not be entitled to any credit.

The disparate results in these decisions are not based upon differences in the details of individual plans, but on differences in analysis of the issue in light of the Act's purposes. The pension plans in all of these cases, though not identical, uniformly require that work be performed in each of a substantial, continuous number of years, and calculate the amount of the pension benefit by reference to the number of years in which work is performed. The Third and Tenth Circuits and, with respect to post-plan benefits, the Ninth Circuit, appear to consider the entitlement to benefits as being governed primarily not by time, but by work actually performed. The pension is thus viewed as a kind of deferred compensation for a substantial work requirement unrelated to seniority. Under this view veterans' rights can be controlled by the employer alone, or by agreement with a union. The Fifth Circuit, on the other hand, has looked to the real nature of the benefits and concluded that "the computation is essentially based upon seniority, since it is based entirely upon time, and not at all upon the amount of work actually performed * * * . Time is the essence of seniority * * * " (Pet. App. 12a).

Whether pension benefits constitute perquisites of seniority under the Act is a question of great importance to veterans, employers, labor unions, and pension plan administrators. So long as it remains unresolved, it promises to generate an increasing volume of litigation as World War II veterans reach retirement age.[5] We are

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[5]See Silver, *Operation of the "Escalator Clause" in Fringe Benefit Cases*, 60 Minn. L. Rev. 45, 69-70 (1975).

advised by the Department of Labor that in addition to the cases already discussed, ten other pension cases are now pending in the district courts and 36 more are ready for filing.[6] Many of these cases will involve nationwide companies which operate facilities in several circuits. A continuing conflict among the circuits would subject these companies to conflicting rules and cause great uncertainty over veterans' pension rights that will encourage further litigation. The present case is, in our view, an appropriate one for resolution of the issue by this Court, and we therefore urge that the petition for a writ of certiorari be granted.

3. If the petition is granted, review should be limited to the principal question presented (Pet. 2, Question 1) and should not include petitioner's "subsidiary issue" involving the applicability of the Alabama one-year statute of limitations (Pet. 2, 12). The district court correctly ruled that Mr. Davis' claim was equitable in nature and therefore was not barred by the Alabama statutes of limitations. Pet. App. 22a-24a. While the case was pending on appeal, the Act was amended to clarify the legislative intent that state statutes of limitations are not to apply.[7] The prior Fifth Circuit cases which petitioner relies upon[8] were

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[6]The Secretary of Labor assists veterans in their efforts to secure their reemployment rights. 38 U.S.C. (Supp. V) 2025.

[7]"No State statute of limitations shall apply to any proceedings under this chapter." 38 U.S.C. (Supp. V) 2022. See *Hirschberg* v. *Braniff Airways, Inc.*, 404 F. Supp. 869 (E.D. N.Y.).

[8]*Blair* v. *Page Aircraft Maintenance, Inc.*, 467 F. 2d 815 (C.A. 5); *Bell* v. *Aerodex, Inc.*, 473 F. 2d 869 (C.A. 5).

specifically repudiated by Congress. S. Rep. No. 93-907, 93d Cong., 2d Sess. 111-112 (1974). The courts below correctly distinguished these cases, and their decision on the limitations issue does not warrant review by this Court.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

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Supreme Court, U.S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

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BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, not officially reported, is set forth at App. 48. The opinion of the United States District Court for the Northern District of Alabama is reported at 383 F.Supp. 880 (N.D. Ala. 1974), and is set forth at App. 22.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on July 1, 1976 (App. 49). The petition for Writ of Certiorari was filed on September 28, 1976, and was granted on January 10, 1977. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1) (1970).

STATUTE INVOLVED

The Military Selective Service Act § 9, ch. 625, § 9, 62 Stat. 604, 614 (1948) [50 U.S.C. App. § 459 (1970)], *as amended*, 38 U.S.C. § 2021 (1974). (App. 51).

QUESTION PRESENTED

Whether the seniority provision of Section 9 of the Military Selective Service Act requires military service to be credited in computing the amount of retirement income under privately-funded pension plans where the amount of retirement income under such pension plans is dependent upon a substantial work requirement?

STATEMENT OF THE CASE

On December 20, 1972, Raymond E. Davis ("Davis") brought this action in the United States District Court for the Northern District of Alabama, Southern Division, for injunctive relief to compel Alabama Power Company ("Alabama Power") to grant Davis Accredited Service, as defined hereafter, for purposes of computing retirement income under Alabama Power's Pension Plan during the period of time Davis was in the military service. Davis' claim was asserted under the Military Selective Service Act, 50 U.S.C. App. § 459 (1970) upon which jurisdiction of the trial court was based.[1] The case was tried without a jury in the United States District Court for the Northern Dis-

1. The Act was originally enacted at 54 Stat. 885. In 1948, it was amended at 62 Stat. 614. The name of the Act was changed in 1951 to the Universal Military Training and Service Act, 65 Stat. 75. In 1967, it was renamed the Military Selective Service Act of 1967, 81 Stat. 100, and in 1971 was changed to the Military Selective Service Act, 85 Stat. 348. The "Vietnam Era Veterans' Readjustment Assistance Act of 1974," P.L. 93-508, 88 Stat. 1578 (December 3, 1974) has recodified these provisions in 38 U.S.C. § 2021. The present §§ 9(b) and 9(c)(1) have remained largely unchanged since 1940 and § 9(c)(2) has been preserved in its current form since the amendments of 1948.

trict of Alabama. The court held that the computation of the retirement income under Alabama Power's Pension Plan was a perquisite of seniority, and therefore Davis' period of military service must be considered for the purpose of computing such retirement income.

On July 1, 1976, the Court of Appeals for the Fifth Circuit affirmed the order of the District Court. This Court granted certiorari on January 10, 1977.

The facts below were agreed to by the parties and are set forth in full as the Agreed Statement of Facts in App. 15-20. Such facts include the following:

Davis was first employed by Alabama Power on August 16, 1936, in a position other than temporary and continued to be employed until March 18, 1943, when he left to perform military service beginning on March 30, 1943, with the Armed Forces of the United States. On October 1, 1945, Davis completed his military service and was reinstated by Alabama Power on October 8, 1945. Davis continued in that employment until June 1, 1971, at which time he retired from employment with Alabama Power.

On July 1, 1944, Alabama Power established a Pension Plan for its employees. A copy of this Pension Plan, as amended to and including the amendment of January 1, 1971, appears at App. 54, et seq.

With respect to treatment of military service, except for certain provisions not applicable to Davis,[2] the Pension Plan has at all times provided that periods of "leaves of absence without regular pay" and military service do not constitute Accredited Service as defined in the Pension

2. The amendment of January 1, 1966, allows veterans to substitute service with Alabama Power prior to the employee's twenty-fifth (25th) birthday, less one qualifying year, as "Accredited Service" for certain military service time. (See § III(3)(a) of the Plan). This provision, however, did not affect Davis since he had no service with Alabama Power prior to his attaining twenty-five years of age. (App. 16).

Plan. (See Sections II.2 and III of the Pension Plan) (App. 59-62).

All contributions to the "Pension Plan Trust Fund" are made by Alabama Power. The amount of these contributions is determined annually on an actuarial basis taking into account factors including, among others, the number of full-time regular employees of Alabama Power who are covered by the Pension Plan, their Accredited Service, and their earnings. The Pension Plan Trust Fund is not funded to pay retirement income based upon the inclusion of military service time as Accredited Service (App. 60).

The Pension Plan of Alabama Power has been the subject of negotiations between Alabama Power and various Local Unions of the International Brotherhood of Electrical Workers since 1950, including Local No. 841 of which Davis was a member at the time of his retirement, and it has been a part of the collective bargaining agreement between Alabama Power and the various Local Unions of the International Brotherhood of Electrical Workers since July, 1961, including Local No. 841.

All *full-time regular* employees of Alabama Power who have completed one year of service with Alabama Power and have attained the age of twenty-five (25) years are included in the Pension Plan. Employees other than full-time regular employees, such as part-time employees and emergency employees, are not included in the Pension Plan and are not eligible to accrue Accredited Service thereunder (see Sections II and III of the Plan) (App. 58 & 60). Pursuant to established directives and practices of Alabama Power, a full-time regular employee is one who is employed on a full-time basis for an indefinite period of time. The full-time regular work week of Alabama Power consists of forty (40) hours per week and regular daily work consists of eight (8) scheduled hours of work per day. With respect

to employees other than those exempted under the Fair Labor Standards Act, hours worked in excess of forty (40) hours per week require overtime compensation. For purposes of the Pension Plan, "earnings" do not include pay for overtime hours (see Pension Plan, Section V.7, at App. 73).

Pursuant to the collective bargaining agreement and the employment policies and practices of defendant, exceptions to, or off-time, from the regular full-time work week are as follows:

(1) from two weeks to five weeks annual vacation, the length of such vacation depending upon the length of the employee's service;
(2) eight holidays per year;
(3) annual sick leave up to ten work days per year or accumulation of a maximum of thirty work days; and
(4) up to three work days as a result of death in the immediate family of an employee.

The periods of time referred to above and enumerated as (1) through (4), inclusive, are with full pay and constitute Accredited Service under the Pension Plan. At Alabama Power's discretion and depending on the circumstances presented, in some cases employees, deserving of such in the opinion of Alabama Power, are allowed up to a maximum of nine (9) months extended sick leave with pay which time is considered by the Retirement Board as Accredited Service for purposes of the Pension Plan. The maximum of nine (9) months is allowed only where the employee has in excess of twenty years service and is considered deserving of such because of his employment record.

According to employment practices and policies of Alabama Power, under no circumstances may an employee be off work without pay in excess of thirty (30) calendar days

without such absence affecting his full-time employment status. The maximum thirty day period of time in which an employee may be off from work without pay is allowed only in cases of extended sickness. Brief, infrequent periods of absence without pay may be permitted for employee emergencies such as family sickness and transportation problems. Such periods of absence without pay do not affect the employee's full-time employment status and constitute Accredited Service under the Pension Plan. If for any reason an employee is off from work without pay for more than thirty calendar days, the total unpaid absence is retroactively deducted from the employee's Accredited Service for purposes of the Pension Plan. The occasions where an employee is permitted time off without pay for extended sickness or personal emergencies under this practice and policy of Alabama Power are infrequent and are not allowed by the company to be abused by employees. Such employment practices and policies do not permit, for example, an employee returning to work after a period of such unpaid sick leave and then qualifying or obtaining a second or successive period of unpaid sick leave to avoid the maximum thirty calendar day limitation.

Davis' Accredited Service under the Pension Plan commenced August 16, 1937, one year after his employment date. Davis accrued Accredited Service from such date until June 1, 1971, when he retired, except for the time spent in military service and a period of time Davis participated in a union strike. When Davis retired he received $198.95 per month retirement income under Alabama Power's Pension Plan. Had Davis received Accredited Service for his period of military service, he would have been entitled to $216.06 per month.[3]

3. Davis' retirement income was based upon § V.4 (ii) of the Pension Plan. The computation of the amount of his benefits, with certain adjustments, is based upon his years of Accredited Service (App. 70).

SUMMARY OF ARGUMENT

Well-reasoned opinions construing Section 9 of the Military Selective Service Act[4] ("Act") have found the requirement that a veteran's "seniority" be restored upon reemployment does not include any employment benefits which are conditioned upon a bona fide work requirement. Where a benefit is intended to be a form of deferred compensation for work performed, the veteran must perform the necessary work requirement for his employer before earning the benefit. The benefit in this case, Accredited Service under the Pension Plan, is conditioned upon a substantial bona fide work requirement. This work requirement was not satisfied and, as a result, this benefit was not earned by Davis.

While the legislative history of the Act does not provide substantial guidance in interpretation of the reemployment provisions of the Act, such legislative history as is available clearly shows that it was not envisioned that employers would fund pension plans on behalf of veterans during their military service. Any such requirement that an employer fund a pension plan during the military service of an employee not only is outside the mandate of the Act but also is manifestly unfair and unjust. Moreover, a requirement that military service time must be credited in computing the amount of pension benefits would threaten the actuarial soundness of this and other similarly situated pension plans.

4. 50 U.S.C. App. § 459 (1970), 62 Stat. 604, 614.

ARGUMENT

The express provisions of Section 9 of the Military Selective Service Act do not require credit for military service in computing the amount of pension benefits where the computation of such benefits is not a function of seniority.

The provisions of Section 9 which are applicable to the reemployment rights of a returning veteran are as follows:

> "(b) Reemployment Rights.
>
> In the case of any such person who, in order to perform such training and service, has left or leaves a position . . . in the employ of any employer and who . . . (2) makes application for reemployment within 90 days after he is relieved from such training and service . . .
>
> * * *
>
> (B) If such position was in the employ of a private employer, such person shall—
>
> (i) if still qualified to perform the duties of such position, be restored by such employer or his successor in interest to such position or to a position of like *seniority, status* and *pay*; . . .
>
> * * *
>
> (c) Service Considered as Furlough or Leave of Absence.
>
> (1) Any person who is restored to a position in accordance with the provisions of paragraph . . . (B) of subsection (b) [of this section] shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored *without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at such time such person was inducted into such forces,* and shall not be

> discharged from such position without cause for one year after such restoration.
>
> (2) It is declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph 9 . . . (B) of subsection (b) [of this section] should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment." (Emphasis Added) [5]

Davis claims that pension benefits generally, and specifically the amount of retirement pay under the Pension Plan, are perquisites of seniority and therefore must be included as Accredited Service in computing his retirement income notwithstanding the contrary provisions of the Pension Plan. Alabama Power's position is that entitlement to the pension benefit in question should be determined by the express terms of the Pension Plan which clearly establish that such a benefit does not arise from seniority. Alabama Power's position is entirely consistent with the decision of this Court in *Accardi v. Pennsylvania R. Co.*, 383 U.S. 225, 229 (1966) [6] where it was recognized that the term "seniority" was not defined in the Act, but rather its content was derived from private employment practices and agreements. The Pension Plan excludes from Accredited Service time in the Armed Forces as well as all other time on furlough or leave of absence without regular pay (§ II.2, App. 59-60). The treatment of Davis by Alabama Power was identical with the established rules and practices of Alabama Power relating to employees on furlough or leave of absence without regular pay (App. 16).

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5. 50 U.S.C. App. §§ 459 (b) (B) (i), (c) (i) (1970), 62 Stat. 604, 615-16. § 9 is set out in full at App. 51.

6. Accardi v. Pennsylvania R. Co. is discussed in more detail *infra*.

Although the legislative history concerning the reemployment provisions of the Act is not extensive,[7] the remarks on the Senate floor during the debate on the 1940 Act[8] lend strong support to the position that a veteran is not to be given credit for his military service time when computing the amount of his pension benefits. In discussing Senate Bill 4164 on August 9, 1940, the following exchange took place in the Senate:

> "Mr. DANAHER. Mr. President, now let me refer the Senator from Texas to the provision on page 24, which reads:
>
> (c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be so restored without loss of seniority, insurance participation or benefits, or other benefits, and such person shall not be discharged from such position without cause within 1 year after such restoration.
>
> Let me ask the Senator, please if he feels that Congress properly can superimpose upon an existing contract of employment between a substitute, if you choose, for a conscriptee and the employer a clause which will so operate as to cause the employer to rehire and to restore the conscriptee to his former position?
>
> Mr. SHEPPARD. Frankly, I do not know. We are trying to do everything we can to help the men called into the service get back their jobs.
>
> Mr. DANAHER. Then, let me ask if it is the understanding of the Senator that, under the clause providing that the conscriptee shall be restored without loss of insurance participation or benefits, that someone else is going to make up somehow to, let us say, the employer's reserve fund the amount of contribution which the particular employee formerly paid into that fund?
>
> Mr. SHEPPARD. That provision refers solely to the benefits to which he was entitled up to the time he left his employment. It does not apply to the time when he was absent in the service.
>
> Mr. DANAHER. But when the bill provides that he shall be restored without loss of insurance participation or benefits, or other benefits, is it meant by that that if a man goes out to serve his country under this conscription plan and comes back he assumes his prior status less 1 year's payment?
>
> Mr. SHEPPARD. That is what this bill intends, as I understand. That is what the members of the committee thought should be and could be done.
>
> Mr. DANAHER. It is not a case of someone else from some source making up those payments?
>
> Mr. SHEPPARD. No."[9]

The above discussion indicates that the intent of the bill was not to require the employer to continue funding the pension plan on behalf of the employee during his absence in the military.

The action of Congress in 1948 in adding subsection 9 (c) (2) to the Act did not change the legislative intent that a veteran would not be given credit under the Act for pension benefits during his military service.[10]

7. The Committee Reports do not provide any guidance as to the intent of the grant of reemployment rights in the Act. See S.Rep. No. 2002, 76 Cong., 3d Sess. (1940); H.Rep. No. 2937, 76 Cong., 3d Sess. (1940) (conference report); S.Rep. No. 1268, 80th Cong., 2d Sess. 16 (1948). The legislative history of the Vietnam Era Veterans' Readjustment Assistance Act of 1974 does not add any further guidance.

8. Act of September 16, 1940, Ch. 720 § 8, 54 Stat. 890.

9. *See* 86 CONG. REC. 10,107 (Responses of Senator Sheppard to questions of Senator Danaher, August 9, 1940).

10. 50 U.S.C. App. § 459(c) (2) (1970), 62 Stat. 604, 615-16. § 9(c) (2) codified the "escalator principle" which was enunciated by this Court in Fishgold v. Sullivan Drydock & Repair Co., 328 U.S. 275, 285 (1946).

The "work requirement" principle confirmed in *Foster v. Dravo Corporation* applies to the treatment of pension benefits under the Act.

Section 9 of the Act does not elevate a veteran to a status which would entitle him to an employment benefit where the benefit is conditioned upon a substantial work requirement which is not satisfied.[11] The most recent confirmation of this principle is in this Court's opinion rendered in *Foster v. Dravo Corporation*.[12] There, the veteran worked the first seven weeks of 1967, before leaving for military service. Upon returning eighteen months later, the veteran worked the last thirteen weeks in 1968. The applicable collective bargaining agreement required employees to work a minimum of 25 weeks in each calendar year in order to earn full vacation benefits. Because this actual work requirement was not satisfied by the veteran, he was not allowed such benefits for either 1967 or 1968. Both the district court and the Court of Appeals for the Third Circuit agreed that since the vacation benefits in question did not accrue automatically with continued employment, but rather were based on a substantial work requirement, the returning veteran had no right based on the Act to the benefits without satisfying the employer's work requirements. The Supreme Court granted certiorari. In reviewing its past treatment of Section 9 of the Act, this Court stated that the Act has consistently been applied to assure that those benefits which would *necessarily* have accrued by virtue of mere continued employment would not be denied simply because

11. *See, e.g.* Foster v. Dravo Corp., 420 U.S. 92 (1975) (vacation pay); Jackson v. Beech Aircraft Corp., 517 F.2d 1322 (10th Cir. 1975) (pension); Litwicki v. Pittsburgh Plate Glass Indus., Inc., 505 F.2d 189 (3d Cir. 1974) (pension); Austin v. Sears, Roebuck & Co., 504 F.2d 1033 (9th Cir. 1974) (vacation pay); Kasmeier v. Chicago R.I. & Pac. R. Co., 437 F.2d 151 (10th Cir. 1971) (vacation pay).

12. 420 U.S. 92 (1975).

of the veteran's military service. This Court then stated as follows:

> "[W]here the claimed benefit requires more than *simple continued status* as an employee, the Court has held that it is not protected by the statute. See McKinney, supra, 357 U.S., at 273, 2 L.Ed. 2d 1305; Tilton v. Missouri Pacific R. Co., 376 U.S. 169, 181, 11 L.Ed. 2d 590, 84 S.Ct. 595 (1964)." 420 U.S., at 97. (Emphasis Added)

Alabama Power insists that the principle set forth in *Foster* applies with full force to the instant case and to pension benefits in general. Application of this principle to the pension benefit here in question is consistent with the Act and is the only principle which is fair to the employer, the veteran and other non-veteran employees. Unless otherwise specifically provided by an employment agreement, to give a veteran increased retirement benefits simply because he was in the military and to deny the same benefits to other employees on furlough or leave of absence without pay would be unjust.

In *Foster* the applicable collective bargaining agreement required an employee to work at least 25 weeks in each calendar year to receive a vacation. While recognizing that a Dravo employee *theoretically* could earn full vacation benefits by doing as little as one hour's work in each of twenty-five weeks during the year, the Court, employing a more logical, realistic and practical view, found that the "plain indication" of the agreement was that a full vacation was intended "in most cases" to be awarded for a full year's work.[13] Noting that a work requirement could be so insubstantial that it would appear to be designed to measure time on the payroll rather than hours on the job, the Court went on to state that:

13. 420 U.S. at 100.

> "[W]here the work requirement constitutes a bona fide effort to compensate for work actually performed, the fact that it correlates only loosely with the benefit is not enough to invoke the statutory guarantee." 420 U.S. at 99-100.

In that case, upon a finding that the veteran had not satisfied the work requirement specified in the collective bargaining agreement, the Court held that the Act did not entitle the veteran to the claimed vacation rights.

The logical extension of the principle in *Foster* to the present case does not leave the veteran unprotected where the benefit is conditioned upon a transparent or insubstantial work requirement. The protection afforded a veteran in such a case is discussed fully by this Court in *Accardi v. Pennsylvania R. Co.*[14] In *Accardi*, the question before the Court was the eligibility of several veterans for severance payments under the Act. There, the veterans worked as firemen on tugboats owned by their employer. Each veteran left his employment for military service and returned to work shortly after discharge and worked thereafter until 1960. In 1959, as a result of a strike and labor dispute regarding the necessity for firemen, a settlement agreement was reached which provided that firemen with less than 20 years' seniority were to be discharged and paid separation pay based on length of "compensated" service. With respect to determining the length of compensated service, the agreement defined a month of compensated service as any month in which an employee worked one or more days, and defined a year of compensated service as 12 such months or a major portion thereof. In computing the compensated service of veterans, years spent in the military were not counted. This Court held that the years in military service had

14. 383 U.S. 225 (1966).

to be treated as compensated service for the purposes of computing the severance pay. The Court stated that the severance agreement defined compensated service in such a manner as to make it possible for an employee to receive credit for an entire year by working a mere seven days. The agreement made no distinction between an employee who worked these seven select days, or a part-time employee, and an employee who worked 365 days during the year. In view of this "bizarre result," this Court decided that compensated service was equivalent to mere length of service rather than actual total service rendered. The Court found that the "real nature" of the severance pay under that agreement was to compensate for lost jobs which was to be measured not by the amount of work an employee did in the past, but by the rights and benefits forfeited by losing the job. The severance payments in *Accardi* were held to be ". . . just as much a perquisite of seniority as the more traditional benefits such as work preference and order of layoff and recall." 383 U.S. at 230. Simply stated, the "work requirement" in *Accardi* was found to be insubstantial. It is important to note that there was no significant work requirement in *Accardi* as there is in Alabama Power's Pension Plan.

In contrast to the circumstances in *Foster* where the veteran had not satisfied the work requirement, in *Eagar v. Magma Copper Co.*,[15] this Court had before it a situation where the veteran had completed all work requirements but had not satisfied an anniversary date requirement unrelated to work. There, the question was whether or not the veteran should be granted vacation pay for the work year following March 12, 1958. The veteran began working for his employer on March 12, 1958, entered the military service on March 6, 1959, and returned to work on May 2, 1962.

15. 389 U.S. 323 (1967).

A collective bargaining agreement provided that vacation benefits were available to employees who had worked 75% of the annual shifts *and were employed on the one-year anniversary date of their employment*, which was March 12 in that case. The Ninth Circuit Court of Appeals denied the veteran relief. The Supreme Court reversed the Ninth Circuit opinion *per curiam* citing *Accardi*. Since the veteran was being denied his benefit solely because he was not present on the one-year anniversary date, there was no real work requirement remaining to be satisfied. The denial of the benefit was based solely on a matter of status which could be satisfied by merely being on the payroll on a particular day — a situation which was fully protected by the Act.

The treatment of veterans under Alabama Power's Pension Plan is completely consistent with the Act as construed by this Court in *Accardi*, *Eagar* and *Foster*. Unfortunately, the opinion in *Foster* was rendered after the district court opinion in the present case. Both the district court and the appellate court opinions rendered in this case are clearly inconsistent with *Foster*. Alabama Power contends that the principles of *Foster* apply equally to pension benefits and, therefore, the question becomes whether the work requirement in the Pension Plan of Alabama Power constitutes a bona fide effort to compensate for work actually performed.[16] If such a work requirement exists, then the Act does not require Alabama Power to compensate Davis in the form of increased retirement pay based on military service time.

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16. In this case the District Court resolved this issue by quoting from the Fifth Circuit case of Ball v. Victor Adding Machine Co., 236 F.2d 170 at 173, 174 (5th Cir. 1956), which held that pension benefits were as much a part of an employee's "wages" as the money paid to him at the time of rendition of his services (App. 36-38). *See* Inland Steel Co. v. NLRB, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949).

In holding that the computation of retirement benefits under the Pension Plan was based solely upon seniority, the district court disregarded the substantial work requirement expressly provided for in the Pension Plan (App. 30). An examination of the Pension Plan establishes that pension benefits are directly related to and dependent upon work performed and compensation earned on a full-time regular basis. The express language of Section II of the Pension Plan (App. 58) specifies that only *full-time regular* employees of Alabama Power who have completed one year of service and attained the age of twenty-five (25) years are included in the Pension Plan (§ II of the Plan, App. 58). As stipulated to by the parties in the Agreed Statement of Facts (App. 17), according to directives and practices of Alabama Power, a full-time regular employee of Alabama Power is an employee who is employed on a full-time basis for an indefinite period of time. The full-time regular work week of Alabama Power consists of forty (40) hours per week and regular daily work consists of eight (8) hours of work per day (App. 17). In this regard, employees other than full-time regular employees, such as part-time employees and emergency employees, cannot meet this work requirement and therefore are not included in the Pension Plan and are not otherwise eligible to accrue Accredited Service thereunder (App. 17).

Each and every exception to the full forty (40) hour work week requirement is consistent with traditional employment practices. Moreover, such a requirement is equally applicable to all employees, and certainly does not render the work requirement insubstantial or transparent. The district court incorrectly disregarded the substantial work requirement of the Pension Plan by giving undue emphasis to a concept calling for precise matching of the amount of

deferred compensation to units of work. The erroneous reasoning of the district court was the result of substantial reliance on the provisions of the VETERANS' REEMPLOYMENT RIGHTS HANDBOOK[17] which expresses the view that military service time must be treated as Accredited Service for all pension plan purposes unless the benefit constitutes "precise additional pay for units of work done"[18] (App. 34-35). The principles of this Court as set forth in *Foster* are controlling over the VETERANS' REEMPLOYMENT RIGHTS HANDBOOK and, rather than requiring an unduly rigid standard, provide practical, realistic and workable guidelines. Alabama Power understands this to be the intent of this Court where it stated in *Foster* that where the work requirement is a good faith effort to compensate for actual work performed, *"the fact that it correlates only loosely with the benefit is not enough to invoke the statutory guarantee."* (Emphasis Added) 420 U.S., at 99-100.

The undue emphasis of the district court on a lack of precise correlation between the amount of deferred compensation and units of work is vividly demonstrated by the court's treatment of the provision of the Pension Plan which excludes overtime pay from "earnings" (App. 73). It is submitted that much greater exceptions to the correlation between compensation and units of work are needed to destroy the legitimacy of the work requirement than those exceptions which exist in Alabama Power's Pension Plan.

Although the proper treatment of pension benefits under the reemployment provisions of the Act has not been presented to this Court, the question has been considered

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17. U.S. Dep't of Labor, VETERANS' REEMPLOYMENT RIGHTS HANDBOOK (1970).
18. Id., at 97.

by the Third,[19] Ninth,[20] and Tenth[21] Circuit Courts of Appeal. The Third and Tenth Circuits, using the same rationale as in *Foster*, have held that a veteran must meet any real work requirements under the applicable plan before being entitled to pension benefits.[22]

The only other circuit court, other than the Fifth Circuit in the instant case, to consider the treatment of pension benefits under the Military Selective Service Act was the Ninth Circuit.[23] The Ninth Circuit, although ruling in favor of the veteran, stated that, at least with regard to "future service" under that pension plan, a veteran was not entitled to pension benefits unless he met the plan's work requirement.

Denial of Davis' claim in this case will not infringe upon traditional concepts of "seniority". Such concepts are generally defined in collective bargaining agreements in a manner so as not to be dependent upon a work requirement, and generally relate to such items as automatic promotions, order of layoff, transfer, order of recall, shift assignments and training opportunities. Such "seniority rights" generally are merely a function of time on the payroll and are not dependent upon merit or performance of work requirements. In contrast, the pension benefit in question here is

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19. Litwicki v. Pittsburgh Plate Glass Indus., Inc., 505 F.2d 189 (3rd Cir. 1974).

20. Smith v. Industrial Employers & Distributors Assn., 9th Cir., 75-1327, 75-1333 (Nov. 23, 1976 and Jan. 26, 1977).

21. Jackson v. Beech Aircraft Corp., 517 F.2d 1322 (10th Cir. 1975).

22. *Litwicki* was decided before this Court's decision in *Foster*, but the decision in *Jackson* was rendered several months after the decision in *Foster*. The District Court for the Northern District of Ohio has also come to the same conclusion as the courts in *Litwicki* and *Jackson*. LaPinta v. Ohio Crankshaft, 77 CCH Labor Cases, ¶ 11,156 (N.D. Ohio 1975), *appeal pending*, No. 76-1158 (6th Cir.).

23. Smith v. Industrial Employers & Distributors Assn., *supra*, note 20.

dependent upon a substantial work requirement and is not available to those who do not *earn* the benefit. While the main purpose of the Act is to protect the veteran, the Act was never intended to give a veteran a competitive advantage over fellow employees who have to work long hours in order to earn the benefit.

The crediting of military service time as Accredited Service in the instant case would have the effect of requiring Alabama Power to pay Davis compensation for service he never rendered to Alabama Power. Surely, the Act does not require this result. As a practical matter, such a result would require Alabama Power to continue funding its Pension Plan on behalf of absent employees without knowing when, if indeed ever, such employees would elect to return to work for the company. This is not required by the Act and is inherently unfair and unjust to Alabama Power.

Alabama Power's Pension Plan has never been funded to include periods of military service time as Accredited Service (App. 17). While the monetary amount of Davis' personal claim is not substantial, the principle he urges this Court to accept could have a significant impact upon the actuarial soundness of Alabama Power's pension fund, as well as other funds similarly situated.

Alabama Power respectfully urges this Court to apply the reasoning in *Foster* to this case. This reasoning would afford Davis all rights and benefits which would have come to him solely by virtue of his having the status of an employee of Alabama Power on leave of absence without regular pay, but would not afford him the pension benefit claimed herein which must be earned by performance of a substantial work requirement.

CONCLUSION

For the reasons stated herein, it is respectfully submitted that the judgment of the court below should be reversed.

Respectfully submitted,

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PROOF OF SERVICE

I, H. Hampton Boles, one of the attorneys for Alabama Power Company, petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 23rd day of February, 1977, I served copies of the foregoing Brief for the Petitioner and the separate Appendix on the several parties thereto, as follows:

1. On the United States, by leaving three copies thereof at the office of Wayman G. Sherrer, Esquire, United States Attorney for the Northern District of Alabama, Federal Building, Birmingham, Alabama, and by mailing three copies in a duly addressed envelope, with first-class postage prepaid, return receipt requested, to Robert E. Kopp, Appellate Section, Civil Division, Department of Justice, Washington, D.C. 20530.

2. On the Solicitor General, by mailing three copies in a duly addressed envelope, with first-class postage prepaid, return receipt requested, to the Solicitor General, Department of Justice, Washington, D.C. 20530.

3. On the Department of Labor, by mailing three copies in a duly addressed envelope, with first-class postage prepaid, return receipt requested, to William H. Berger, Esquire, Department of Labor, Washington, D.C. 20210.

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FOR ARGUMENT

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No. 76-451

In the Supreme Court of the United States

OCTOBER TERM, 1976

ALABAMA POWER COMPANY, PETITIONER
v.
RAYMOND E. DAVIS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (App. 48) is reported at 542 F. 2d 650. The opinion of the district court (App. 22–45) is reported at 383 F. Supp. 880.

JURISDICTION

The judgment of the court of appeals was entered on July 1, 1976. The petition for a writ of certiorari was filed on September 28, 1976, and was granted on January 10, 1977. This Court's jurisdiction rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether pension benefits, provided by an employer and computed on the basis of an employee's total years of service with the employer, are perquisites of seniority toward which a returning veteran is entitled to credit his time in the military service under Section 9 of the Military Selective Service Act, 50 U.S.C. App. 459.[1]

STATUTE INVOLVED

Section 9 of the Military Selective Service Act, 62 Stat. 614, as amended, 50 U.S.C. App. 459, provides in relevant part:[2]

* * * * *

(b) Reemployment rights.

In the case of any such person who, in order to perform such training and service, has left or leaves a position * * * and * * * makes application for reemployment within

[1] Petitioner also sought review on the subsidiary issue whether the lower courts correctly ruled that state statutes of limitations do not apply to actions under the Act. While this case was pending on appeal, the Act was amended to provide that state statutes of limitations are not applicable to veterans' reemployment rights actions. See 38 U.S.C. (Supp. V) 2022. This Court limited the grant of certiorari to exclude this question.

[2] The veterans' reemployment provisions at issue here have recently been re-codified without significant change in 38 U.S.C. (Supp. V) 2021 *et seq.* by the Vietnam Era Veterans' Readjustment Assistance Act of 1974, Pub. L. 93–508, 88 Stat. 1578, 1594. References in this brief will be to the provisions of Title 50 U.S.C. Appendix that were in effect at the time of respondent's retirement.

ninety days after he is relieved from such training and service * * *

* * * * *

(B) if such position was in the employ of a private employer, such person shall—

(i) if still qualified to perform the duties of such position, be restored by such employer * * * to such position or to a position of like seniority, status, and pay;

* * * * *

(c)(1) Any person who is restored to a position in accordance with the provisions of paragraph * * * (B) of subsection (b) * * * shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

(2) It is declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph * * * (B) of subsection (b) * * * should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering

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the armed forces until the time of his restoration to such employment.

* * * * *

STATEMENT [3]

Respondent, Raymond E. Davis, a World War II veteran, sued his former employer, Alabama Power Company (or "Company") under the Military Selective Service Act ("Act") seeking credit for his time in the military service towards the computation of his pension benefits.[4]

The Company first employed Mr. Davis in a non-temporary position on August 16, 1936. He worked continuously until March 18, 1943, and then left the Company's employ to serve in the armed forces. On October 1, 1945, after two years and six months of military service, he was honorably discharged; on October 8, 1945 he was reinstated to his former position with Alabama Power Company. Mr. Davis continued that employment until he retired at age 61 on June 1, 1971 (App. 15).

On July 1, 1944, Alabama Power Company adopted a pension plan for its employees. The plan gave employees credit for employment prior to that date and provided for the accrual of credit based on future service. Pension benefits presently are payable from a trust fund which is funded exclusively by the Company (Plan Section IX, App. 92–93).

[3] The facts were stipulated below (App. 15–20) and are not in dispute. The pension plan, incorporated into the stipulation (App. 16), is set forth at App. 54–102.

[4] The Department of Justice represents respondent pursuant to 50 U.S.C. App. 459(d) (now 38 U.S.C. (Supp. V) 2022).

Only full-time regular employees, that is, those who work at least forty hours per week and are employed for an indefinite period, are eligible for participation in the plan (Plan Section II.1, App. 58–59; see also App. 25). Such employees become covered after they have reached their twenty-fifth birthday and have completed one year's employment with the Company (Plan Section II.1, App. 59; see App. 17). An employee normally retires at age 65 and immediately begins to receive benefits. An employee may, however, retire after reaching age 55 if he has 20 years' service and begin to receive immediate, although reduced, benefits.[5] (Plan Sections I, App. 57 and IV, App. 64–65.) Mr. Davis chose this early retirement option at age 61. An employee who quits or whose services are otherwise "terminate[d]" by the Company is ineligible for any benefits unless he has had 20 years' service with the Company (or 15 years' service if he is over age 50 at the time of termination) (Plan Section VII, App. 90).[6]

The amount of an employee's monthly benefits generally turns on the total years of "accredited service" the employee accrues prior to retirement. The plan defines "accredited service" as the total of "past service" and "future service." With conditions not

[5] An employee may work beyond the normal retirement age of 65 only at the request of the Company and with the annual approval of the Board of Directors. Plan Section IV.2, App. 64–65.

[6] Benefits for terminated employees with the requisite 15 or 20 years of service do not begin until age 65. Plan Section VII, App. 90.

here relevant, "past service" is defined as the "period of service * * * of an employee with Alabama Power Company" prior to July 1, 1944 (the date of the adoption of the plan) while "future service" is the "period of service" after July 1, 1944. Under the provision of the plan applied in Mr. Davis' case, the monthly amount of his pension is calculated by multiplying roughly one percent of the employee's monthly earnings at time of retirement by his total years of "accredited service."[7]

Time spent in military service is not included in "accredited service," except in narrow circumstances not applicable to this case.[8] Thus when Mr. Davis retired on June 1, 1971, he was denied credit for the two years and six months he served in the armed forces in the calculation of the amount of his pension. The monthly benefit of $198.95 Mr. Davis was accorded by the Company is $17.11 less than the amount he would receive were he credited with the time he spent in military service (App. 19).

[7] Davis' benefit was determined under the "Minimum Retirement Income" provision (App. 27; see Plan Section V.4. App. 68–71). This provision is utilized if the amount determined thereunder exceeds the amount to which the employee would be entitled under the standard computation. Plan Section V.1 through V.3, App. 65–68. Both methods of computation, however, are based on years of accredited service multiplied by an earnings factor.

[8] Under a 1966 amendment to the plan, a returning veteran is credited with the time spent in military service prior to his 25th birthday (the normal date on which an employee becomes eligible for the plan), less one year, App. 16, see Plan Section III.3(a), App. 61. Davis, however, was not employed by the Company prior to his 25th birthday.

This suit was filed on December 20, 1972. The complaint (App. 5–6) alleged that Alabama Power Company was required by the Act to credit Mr. Davis with his two years and six months of World War II military service in the calculation of the amount of his pension benefit due upon his retirement. The district court entered judgment for Davis (App. 45–46).

The district court concluded that "[t]here can be no question that the computation [of pension benefits] is based upon seniority" (App. 30) and that denying Davis credit for his military service would violate the Act's requirement that returning veterans be accorded the seniority they would have earned but for their absence. The court found that the purpose of the pension benefits was "to promote personnel stability by giving employees an incentive to remain with the company" (App. 32) and that there was no evidence that the benefits were "based upon any 'unit of work' requirement" (App. 35). The district court also held that the plan could not be defined as "other benefits" under the Act so as to deny Davis credit for his military service (App. 35–36).[9] It ordered the company to increase Davis' pension accordingly, retroactive to the date of retirement.

[9] The district court rejected Alabama Power Company's arguments that the plan was a "gratuity" (App. 36–38), that credit for military service would impair the Company's constitutional rights (App. 38–39), and that Mr. Davis' claim was barred by the statute of limitations or by laches (App. 39–45). Petitioner does not challenge these rulings. See note 1, *supra*.

A divided panel of the court of appeals affirmed *per curiam* "on the basis of the well-reasoned opinion" of the district court (App. 48–49).[10]

SUMMARY OF ARGUMENT

The Military Selective Service Act requires that an employer reinstate a veteran returning from military service to the job the veteran held prior to his departure; the veteran, furthermore, is to be reinstated "without loss of seniority". This provision requires that the veteran receive seniority credit for his military service so that, upon his return to the job, he stands in the same place on the seniority escalator as he would have stood had he remained on the job without interruption.

This Court has interpreted the Act liberally in favor of the veteran, refusing to limit the Act's protection only to those benefits considered as seniority rights by tradition or by the collective bargaining agreement. The Court has looked to the "real nature" of the benefit to determine if it is a perquisite of seniority or simply a short-term form of deferred compensation made in return for the performance of work. Thus, for example, where severance pay is measured, as a practical matter, by length of service, the amount of such pay is a perquisite of seniority and the employer

[10] In his dissenting opinion, Judge Roney cited the decisions of the courts of appeal for the Third and Tenth Circuits which held that pension benefits are not perquisites of seniority under the Act. *Litwicki* v. *Pittsburgh Plate Glass Ind., Inc.*, 505 F. 2d 189 (C.A. 3); *Jackson* v. *Beech Aircraft Corp.*, 517 F. 2d 1322 (C.A. 10).

must therefore include the employee's military service in computing the amount to which he is entitled. On the other hand, conventional vacation benefits which accrue annually to employees are considered a form of compensation which the seniority protection does not reach.

Pension benefits, by their very nature, are based on length of service rather than on the amount of work performed. The benefits are intended to provide financial security for the retiree and, by encouraging lengthy service, pension plans serve legitimate needs of the employer, the most important of which is the development of an efficient, productive and stable work force. The employer thus holds out to the employee the prospect of financial reward, not in return for the day-to-day service for which the employee receives wages and other short-term benefits, but in return for the employee's dedication of all or a great part of his productive years to the employer's service. The benefits are measured by the length of service, not by the work performed in the process.

The inherent nature of the pension as an incentive for, and reward for, continuous service is demonstrated by the plan in the case. An employee must work 15 or 20 years, depending on his age, before he is entitled to receive any benefit whatever under the plan, and full benefits require service until age 65. A worker who dies before retirement without a surviving spouse receives nothing under the plan. Furthermore, in computing the amount of benefits, the plan disregards actual overtime work performed and

conversely, includes non-working time spent on vacations, holiday, and sick leave.

These aspects of the plan demonstrate that the employees' benefits are premised on time spent on the payroll, rather than on the work actually performed. They reinforce the conclusion that Davis' time spent in military service, but for which he would have been receiving credit toward his pension, must be included in determining his pension benefits.

ARGUMENT

PENSION BENEFITS CONSTITUTE PERQUISITES OF SENIORITY UNDER 50 U.S.C. APP. 459

A. IF AN EMPLOYEE BENEFIT IS BY ITS "REAL NATURE" A PERQUISITE OF SENIORITY A RETURNING VETERAN IS ENTITLED TO HAVE HIS TIME IN THE MILITARY SERVICE COUNTED TOWARD ACCRUAL OF THAT BENEFIT IRRESPECTIVE OF WHETHER THE COLLECTIVE BARGAINING AGREEMENT CONDITIONS THE ACCRUAL OF THE BENEFIT ON A SUBSTANTIAL WORK REQUIREMENT

In passing the Nation's first peacetime draft law in 1940 (54 Stat. 885), Congress determined that "he who is called to the colors is not to be penalized on his return by reason of his absence from his civilian job." [11] Congress therefore provided, in what was later codified as 50 U.S.C. App. 459(b)(A)(i),[12] that a veteran who left a civilian job must, upon return, "be restored [by his employer] * * * to such position or to a position of like seniority, status and pay." Congress also provided, in what became 50 U.S.C. App.

[11] *Tilton* v. *Missouri Pacific R. Co.*, 376 U.S. 169, 170–171; *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284.

[12] Now 38 U.S.C. (Supp. V) 2021(a).

459(c)(1),[13] that the veteran was to be restored to his job (or to one of "like seniority, status and pay") "without loss of seniority." Congress further required that the returning veteran be allowed to "participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence."

The Act thus distinguished between benefits derived from seniority, to which the returning veteran was entitled as of right, and "insurance or other benefits," to which the veteran was entitled only to the extent such benefits were provided to employees on nonmilitary leave of absence. But the Act provided no definition of seniority or of "other benefits." [14]

In *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, this Court construed for the first time the Act's requirement that a veteran be reinstated "without loss of seniority," and concluded that the employee does not simply retain his seniority but adds to it while in the military service (*id.* at 284–285):

> [The returning veteran] does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war. * * * * * * * * *

[13] Now 38 U.S.C. (Supp. V) 2021(b)(1).

[14] Congress' primary purpose in passing the Act was to draft men for military service. The reemployment provisions received secondary attention. See Note, *The Supreme Court, 1965 Term*, 80 Harv. L. Rev. 123, 148 (1966).

> He acquires not only the same seniority he had; his service in the armed services is counted as service in the plant so that he does not lose ground by reason of his absence.

In so holding, the Court emphasized that the Act was "to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need." *Id.* at 285; see *Tilton* v. *Missouri Pacific R. Co.*, 376 U.S. 169, 181.

In its reenactment of the statute in 1948, Congress expressly approved this "escalator principle" and incorporated it in what became 50 U.S.C. App. 459 (c)(2).[15] See *McKinney* v. *Missouri-Kansas-Texas R. Co.*, 357 U.S. 265, 271; *Tilton* v. *Missouri Pacific R. Co., supra*, 376 U.S. at 175. That section provides that a returning veteran should be restored to his employment:

> * * * in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.

Protection against lay-off, to which the Court applied the escalator principle in *Fishgold,* was a right or benefit traditionally regarded as an attribute of seniority. In the years following the *Fishgold* decision, the escalator principle became firmly established in regard to other traditional seniority perquisites, such as order of promotion and priority with respect to job assignments. See, *e.g., Tilton* v. *Missouri Pacific*

[15] Now 38 U.S.C. (Supp. V) 2021(b)(2).

R. Co., supra. Questions remained, however, whether the rule should be applied to other benefits which, although part of the consideration bargained for in collective bargaining negotiations, had not traditionally been considered a part of "seniority" rights. If all such fringe benefits were considered "insurance or other benefits" under 50 U.S.C. App. 459(c)(1), the returning veteran would not be entitled to apply the time he spent in the military service towards the accrual of any fringe benefits, except to the extent his employment contract might provide fringe benefits to employees on non-military leaves of absence.[16]

In *Accardi* v. *Pennsylvania R. Co.*, 383 U.S. 225, the Court rejected this narrow view and extended the Act's protection to severance pay, a benefit "not traditionally considered a seniority right." *Foster* v. *Dravo Corp.*, 420 U.S. 92, 97. Under a collective bargaining agreement involved in *Accardi*, each discharged employee was paid a separation allowance according to a formula based upon the length of his "compensated service" with the railroad. The rail-

[16] A number of lower courts addressing this issue in the wake of *Fishgold* concluded that only traditional seniority rights, stemming from the relative position among all employees within a specific job group determined by the length of service with the employer, were protected by the escalator principle, while fringe benefits derived by collective bargaining and awarded on the basis of a "continuous service" requirement were automatically deemed "other benefits". See, *e.g. Siaskiewicz* v. *General Electric Co.*, 166 F. 2d 463 (C.A. 2); *Seattle Star* v. *Randolph*, 168 F. 2d 274 (C.A. 9); *Brown* v. *Watt Car & Wheel Co.*, 182 F. 2d 570 (C.A. 6), certiorari denied, 340 U.S. 875; *Borges* v. *Art Steel Co.*, 246 F. 2d 735 (C.A. 2).

road argued that time spent in military service need not be included as compensated service because severance pay was not based on seniority—as indeed under the terms of the agreement it was not. But the Court concluded that the severance payments were made in return for the surrender of jobs and that the amount was primarily based on the employee's length of service with the company. Thus, the Act required that time spent in military service be included; the amount of severance pay was, in the Court's view a perquisite of seniority "no matter how calculated," and those who had the most seniority received the highest allowances. 383 U.S. at 230.[17]

Following *Accardi*, employers defending veterans' suits brought under the Act attempted to distinguish that case by showing that benefits were based upon a substantial work requirement measured in days or even hours and therefore were not perquisites of seniority.[18] But such a distinction involves the untenable proposition, as the court pointed out in *Palma-*

[17] The Court also drew support for its conclusion that the severance pay was not based on actual work performed by the "bizarre results" that the formula could produce—theoretically, an employee could earn a year of "compensated service" by working one day per month for seven months. The Court did not suggest, however, that the coverage of the Act depended on whether a bizarre result could be shown in future applications.

The Court also laid to rest the notion that simply categorizing the severance pay as "insurance or other benefits" could deprive the veteran of inclusion of his time in military service in calculating the amount of the benefit. That clause, said the Court, "was intended to add certain protections to the veteran and not to take away those which are granted him by [the statutory protection of seniority]." *Id.* at 232.

[18] See Comment, *Veterans' Reemployment Rights: Severance Pay*, 1974 Wash. U. L. Q. 296, 303.

rozzo v. *Coca-Cola Bottling Co.*, 490 F. 2d 586 (C.A. 2), certiorari denied, 417 U.S. 955, that the Act's protection of veterans' seniority and perquisites of seniority could be defeated by collective bargaining agreements that "redefine a benefit simply by making it contingent on work time rather than seniority." 490 F. 2d at 592. "To say that severance benefits accruing with years of service are protected under the Act as perquisites of seniority as the Court said in *Accardi* and then to make those rights contingent on the extent to which the union incorporates work requirements as a condition for receipt of benefits would render the Act entirely nugatory * * * because any perquisite of seniority can be based upon actual work hours rather than length of employment." *Ibid.* Since "promotion or lay-off preferences could [not] be contingent on work requirements, rather than length of service, without violating the Act," neither should the veteran's eligibility for severance pay based on years of service be limited because eligibility was expressed in terms of a work requirement. *Ibid.*

What matters, then, is the functional nature of the benefit at issue. As the Court stated in *Foster* v. *Dravo Corp., supra,* 420 U.S. at 97, "benefits and advancements that would necessarily have accrued by virtue of continued employment" if the veteran had not entered military service are protected, regardless of whether the benefit had been "traditionally considered a seniority right." In *Foster,* the Court rejected the veteran's theory that an employee who served in the Armed Forces was nonetheless entitled to accumulated

vacation benefits when he returned to his employer, a theory "sharply inconsistent with the common conception of a vacation as a reward for and respite from a lengthy period of labor." *Id.* at 101." The Court thus refused to award such benefits in the absence of a clear showing that vacations were, like the severance payments in *Accardi,* "intended to accrue automatically as a function of continued association with the company." *Ibid.*

The Court's decisions from *Fishgold* through *Accardi* and *Foster* provide the framework for determining whether a particular fringe benefit is covered by the seniority provisions of the Act, which are to be "liberally construed for the benefit of those who left private life to serve their country." *Fishgold, supra,* 328 U.S. at 285. Instead of relying upon "technical definition[s]," *Accardi, supra,* 383 U.S. at 229, or "narrow characterization * * * in the collective-bargaining agreement," *Foster, supra,* 420 U.S. at 98, the Court will look to the "real nature" of the benefit to determine whether the Act's seniority provisions protect it. *Accardi, supra,* 383 U.S. at 230. If the benefit provides, in return for actual work performed, a current return, either in the form of actual payment or immediate vesting (*e.g.,* vacation benefits), then the benefit is "a form of short-term compensation," *Foster,*

[19] The Court found it significant that employees who worked overtime drew additional vacation benefits, which increased as the amount of overtime increased, and that an employee who was laid off before accumulating 25 weeks' work nonetheless earned vacation benefits on a pro rata basis. 420 U.S. at 100.

supra, 420 U.S. at 100, and not protected against loss by the Act. On the other hand, if the benefit primarily rewards the employee for length of service, rather than for actual work performed, *Accardi, supra,* then the benefit is a perquisite of seniority and the veteran's entitlement to it cannot be defeated by a substantial work requirement. See *Palmarozzo, supra,* 490 F. 2d at 591–592.

As we show below (Sections B and C), under this test Davis' pension is a perquisite of seniority and the Act requires the Company to count his military service as time on the job for purposes of his pension.

B. PENSION BENEFITS ARE BASED UPON LENGTH OF SERVICE RATHER THAN ON WORK ACTUALLY PERFORMED AND ARE GIVEN IN EXCHANGE FOR THE EMPLOYEE'S LOSS OF HIS JOB RATHER THAN AS SHORT-TERM COMPENSATION.

The pension plan in this case focuses not on actual work performed but on the employee's long association with the company, to the end that the employee has a measure of financial security in his later years. A pension's "real nature" in this latter respect is "compensation for loss of jobs," and thus under *Accardi* the amount of the benefit is a "perquisite of seniority." 383 U.S. at 230.

Although "it is doubtful that the private pension movement can be explained in terms of any one social or economic philosophy," [20] there is a "growing realization or conviction that any employer who utilizes the services of an employee for an extended period

[20] McGill, *Fundamentals of Private Pensions* 20 (3d ed. 1975).

of time has an obligation to make some contribution toward the individual's retirement needs." [21] Pension plans not only represent economic security for the retiree, but serve a variety of legitimate purposes of the employer in ways that short-term wages and benefits do not. Companies with pension plans can attract more desirable employees, especially at the supervisory or executive level, than companies without such plans.[22] Pension plans are believed by many employers to be "a means of inducing long service and employee identification with the employer," [23] to enhance the morale of employees by reducing worry about financial security in old age,[24] to reduce employee turnover and retraining costs [25] and to provide recognition of the "special contributions, not reflected in wage payments, of a long-service employee to the

[21] McGill, *supra*, at 18. The importance of pensions was recognized by Congress when, in enacting the comprehensive Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat, 832, 29 U.S.C. (Supp. V) 1001 *et seq.*, that body found that "the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial." 29 U.S.C. (Supp. V) 1001 (a). There can no longer be any question but that "the continued well-being and security of millions of employees and their dependents are directly affected by these plans." *Ibid.* Some 30 million workers—almost half the nonagricultural work force—are now covered by some form of private pension plan. H.R. Rep. No. 93–533, 93d Cong., 1st Sess. 3 (1973).

[22] O'Neal, *Stockholder Attacks on Corporate Pension Systems*, 2 Vand. L. Rev. 351, 357 (1949); McGill, *supra*, at 22–23; *Whitley* v. *Mammoth Life and Acc. Ins. Co.*, 273 S.W. 2d 42, 43 (Ky. Ct. App.).

[23] Bernstein, *The Future of Private Pensions* 11 (1964).

[24] O'Neal, *supra*, at 357.

[25] McGill, *supra*, at 22.

firm," such as the transmission of skills from experienced workers to younger ones.[26]

The most important and widely agreed on benefit of a pension plan is its central role in promoting the efficiency of the labor force; employees who retire after long service not only step aside with a measure of financial independence but by doing so open the channels of advancement for younger workers, thus improving morale and stability at all levels of the organization.[27] In order to develop an experienced, productive and stable work force, the employer thus holds out to the employee the prospect of financial rewards at the end of lengthy service, not in return for his day-to-day work—for which he is paid wages and short-term benefits such as vacations—but for the longevity of his service, the simple return to the job day after day, week after week, year after year.[28]

Pension benefits serve a function analogous to the severance allowance involved in *Accardi*. There, severance resulted from elimination of the employee's position. Here, the position continues but the employee is required to surrender it to a younger worker. From the retiree's standpoint there is no difference——he

[26] *McGill*, *supra*, at 20.

[27] *Id.* at 20–21. See 29 U.S.C. (Supp. V) 1001(a).

[28] See *Hunter* v. *Sparling*, 87 Cal. App. 2d 711, 724–725, 197 P.2d 807, 815; *Wilson* v. *Rudolph Wurlitzer Co.*, 48 Ohio App. 450, 194 N.E. 441; *Cantor* v. *Berkshire Life Ins. Co.*, 171 Ohio St. 405, 408–409, 171 N.E. 2d 518, 521; *Bird* v. *Connecticut Power Co.*, 144 Conn. 456, 462–463, 133 A.2d 894, 897; *Schofield* v. *Zion's Co-Op. Mercantile Inst.*, 84 Utah 281, 39 P.2d 342; *Hughes* v. *Encyclopedia Brittanica*, 1 Ill. App. 2d 514, 117 N.E. 2d 880; *Texas & N. O. R. Co.* v. *Jones*, 103 S.W. 2d 1043, 1046 (Tex. Civ. App.); cf. *Alexander* v. *Fioto*, No. 75–1704, decided April 4, 1977, slip op. 6.

loses his job.[29] "And the cost to an employee of losing his job is not measured by how much work he did in the past—no matter how calculated—but by the rights and benefits he forfeits by giving up his job." *Accardi* v. *Pennsylvania R. Co. supra,* 383 U.S. at 230. When the employee is permitted to work no longer, he is entitled under the pension plan to exchange his accumulated seniority for monthly retirement payments.

The Court has recognized the direct correlation between seniority and pension benefits. In *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, an employment discrimination case under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e–5, the Court concluded (*id.* at 765) that the statute empowered federal courts to award discrimination victims a "seniority remedy slotting the victim in that position in the seniority system that would have been his" but for the discriminatory hiring practices.[30] The Court made clear that an award of seniority encompassed such benefits as "length of an employee's vacation [31] and pension benefits."[32] 424 U.S. at 767 (footnotes omitted).

[29] In this case, Davis was not forced to give up his job when he did; he could have remained another four years, to age 65. But the mandatory loss of his job was in sight, and his early retirement merely anticipated the inevitable.

[30] The Court analogized the remedy available under the Civil Rights Act to awards of retroactive seniority under the Military Selective Service Act. 424 U.S. at 778.

[31] Compare *Foster* v. *Dravo Corp.*, *supra*, 420 U.S. at 101, n. 9.

[32] While the Court was divided on the degree to which federal courts could award "competitive" seniority relief, such as order of layoff and recall, it unanimously approved the restoration of "benefit type" seniority relief such as pension benefits.

Alabama Power Company argues, however, that the pension benefits Davis claims are not given in return for long service but are, like the vacation benefits in *Foster,* a form of compensation for actual work performed (Pet. Br., pp. 12–20). But the theory that a pension is simply deferred wages or compensation (Pet. Br., p. 18) is indeed a "tenuous" one where, as here, the employee's right to the pension is not immediately vested:[33]

[33] *Litwicki* v. *Pittsburgh Plate Glass Ind., Inc.*, 505 F. 2d 189 (C.A. 3), and *Jackson* v. *Beech Aircraft Corp.*, 517 F. 2d 1322 (C.A. 10) were wrongly decided because the decisions rested on the view that pensions were simply deferred compensation and thus those cases are erroneous. *Litwicki* relied on *Inland Steel Co.* v. *National Labor Relations Board*, 170 F. 2d 247, 248–255 (C.A. 7), certiorari denied in part, 336 U.S. 960, affirmed on other grounds *sub nom. American Communication Ass'n* v. *Douds*, 339 U.S. 382, which held that pension plans were "wages * * * or other conditions of employment" subject to mandatory bargaining under the National Labor Relations Act (NLRA). See *Bartmess* v. *Drewrys U.S.A., Inc.*, 444 F. 2d 1186, 1188 (C.A. 7), certiorari denied, 404 U.S. 939. The fact that a fringe benefit may be classified as "wages" under the NLRA is not indicative that the benefit constitutes actual wages for purposes of the Military Selective Service Act. See *United States* v. *Embassy Restaurant*, 359 U.S. 29, 33, where the Court held that an employer's payments to a union welfare fund, though "wages under the N.L.R.A." for bargaining purposes, were not "wages" under the Bankruptcy Act.

Litwicki also found significant the pension plan's requirement that a year's accredited service required 1,500 hours' actual labor in the plant. But, as we have already shown, the presence of a work requirement expressed in hours or days cannot determine the outcome for purposes of the Act. Such an approach overlooks the fact that even the most traditional seniority benefits can purport to be based on a substantial work requirement, thereby defeating the purpose of the Act to protect true seniority benefits, regardless of label. See *Palmarozzo* v. *Coca-Cola Bottling Co.*, *supra.* Finally, *Litwicki* relied on the Report of the Senate Subcommittee on Wel-

> From the standpoint of an individual participant, this [deferred wages] concept has validity only if the funds paid into a pension plan in lieu of a personal wage increase are administered in such a manner as to ensure their ultimate payment to him or his beneficiary in one form or the other. This implies full and immediate vesting of employer contributions on behalf of current participants, a practice rarely encountered among industrial pension plans.[34]

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fare and Pension Funds, S. Rep. No. 1734, 84th Cong., 2d Sess. 3 (1956), for the proposition that pension benefits should be viewed as deferred wages under the Act. When read in context, however, the Report shows that the Subcommittee was attempting to illustrate only that employees had an interest in the management of company pension plans. The Report is not probative on the question presented in this case.

Jackson followed *Litwicki* and its result is erroneous for the reasons noted above.

We also believe the Ninth Circuit's decision in *Smith* v. *Industrial Employers and Distributors Ass'n*, 546 F. 2d 314, is incorrect insofar as it ruled that veterans are not entitled to count their time in the military in computing future service under the company's pension plan. In our view, the Ninth Circuit's premise that it was not required to examine the "general function of pension benefits," 546 F. 2d at 318, was unsound. The crucial inquiry, and the one the Ninth Circuit failed to undertake, was whether the benefits compensate for short-term labor or, on the other hand, primarily reward length of service.

[34] McGill, *supra*, at 19. (Professor McGill was the Chairman of the Pension Research Council of the Wharton School, University of Pennsylvania.) See also *Knoll* v. *Phoenix Steel Corp.*, 465 F. 2d 1128, 1131 (C.A. 3), certiorari denied, 409 U.S. 1126; *Connell* v. *United States Steel Corp.*, 516 F. 2d 401, 408 (C.A. 5); Comment, *Consideration for the Employer's Promise of a Voluntary Pension Plan*, 23 U. Chi. L. Rev. 96, 103 (1955) ("[U]nder the deferred wage analysis the employee's rights vest as soon as he earns the amount contributed or set aside for his benefit.").

The absence of a precise wage equivalency—funding of the plan at the rate of x cents per hour of labor—further undercuts

C. THE PLAN IN THIS CASE REWARDS LENGTHY SERVICE RATHER THAN WORK ACTUALLY PERFORMED

The particular provisions of Alabama Power Company's pension plan further confirm that the benefits under it are given in exchange for the rights and benefits the worker surrenders along with his job, rather than "as a form of short-term compensation for work performed." *Foster* v. *Dravo Corp., supra,* 420 U.S. at 100.[35] Under the plan, an employee who leaves the Company for reasons other than retirement before completing 20 years of service (or 15 years of service if he has reached his 50th birthday) cannot receive any benefits under the plan (Plan Section VII, App. 90). An employee with less than 15 or 20 years' service who is laid off by the Company and is not recalled within one year forfeits all accumulated service he has theretofore gained and is "considered a new employee" for pension purposes if later called back to work (Plan Section III. 4, App. 62–63). If an employee dies before reaching retirement age and leaves no surviving spouse, neither his family members nor

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the deferred wage concept. McGill, *supra*, at 20. There is no express or implied wage equivalency in the instant plan. See Section G, *infra*.

[35] It is possible to imagine a pension plan that awards benefits based strictly on actual work performed, as where a clothing manufacturer contributes a certain amount to the fund for each pair of pants a worker produces, or where an employer contributes a certain amount for each hour the employee is actually on the job and no more, and the employee is guaranteed of receiving the monies at any time, with no contingency. Only in the event of "precise wage equivalency" and "full and immediate vesting" as described above could such a plan be considered a form of compensation. See McGill, *supra*, at 19, and note 34, *supra*; U.S. Department of Labor, *Veterans' Reemployment Rights Handbook* 97 (1970).

his estate receives any pension benefits, no matter how long he worked for the company.[36]

These provisions contrast sharply with the vacation benefits in *Foster,* where the Court 's conclusion that the benefits were a form of short-term compensation was based in part on the fact that an employee who was laid off prior to becoming eligible for full benefits nonetheless received pro rata benefits. There is no "pro rata pension" for the employee with less than 15 or 20 years' service with Alabama Power Company. A pension benefit is not the functional equivalent of wages or a form of deferred compensation if an employee can work for the Company for 14 or 19 years and receive nothing under the plan, or if an employee can work thirty, forty, or more years and his estate receive nothing if he dies before retiring.[37]

[36] Plan Section V.9, App. 74. The "provisional payee" referred to in Section V who is to receive payments after the employee's death must be a surviving spouse. Plan Section I, App. 57.

[37] It was in part to mitigate the harsh results caused by lengthy vesting requirements that Congress enacted the Employment Retirement Income Security Act of 1974, 88 Stat. 832, 29 U.S.C. (Supp. V) 1001 *et seq.* (ERISA). Under ERISA a pension plan must meet one of three minimum vesting standards designed to provide employees with, generally, a vested right to accrued benefits after 10 to 15 years' service, depending on the standard adopted by the plan. See 29 U.S.C. (Supp. V) 1053. However, as to plans in effect at the time of its enactment, ERISA applies only to plan years beginning after December 31, 1975. 29 U.S.C. (Supp. V) 1061(b)(2). Moreover, this relaxation of vesting rules does not, in our view, change the nature of pension plans from a perquisite of seniority to a benefit based on a substantial work requirement for purposes of Section 9 of the Military Selective Service Act. See note 35, *supra.*

Further evidence that the plan is based on lengthy service rather than on the performance of actual work as such is found in the plan's treatment of accredited service as applied to vacations, holidays and sick leave, on the one hand, and to overtime work on the other. Under the plan, an employee receives "accredited service" for substantial periods of time when he is performing no actual work—from two to five weeks' annual vacation, eight holidays and annual sick leave of ten work days per year (App. 18). In some circumstances, employees can take extended sick leave of up to nine months with pay, accumulating accredited service all the while despite performing no actual work. Even if the employee does not use the extended sick leave allowance, if he takes a vacation each year for 30 years, plus holidays and normal sick leave, he is away from work for more than 1000 days, or the working equivalent of 48 months,[38] yet earns full accredited service for those entire 48 months.

Conversely, overtime work does not constitute "accredited service" under the plan (App. 18). The record does not reflect how much overtime Davis worked in his thirty-two year career with Alabama Power Company. But if, for example, he worked overtime only one day per month during his employment, this would yield 384 days, or more than 18 months of actual work performed without earning a single day's "accredited service." This presents another con-

[38] Based on 21 working days per month.

trast with *Foster,* where the Court noted that vacation benefits increased as overtime increased.

These results, when considered in conjunction with the absence of vesting prior to 14, 19 or even more years' work, are persuasive evidence that accredited service under the plan is not a function of actual work performed but of length of service with the Company."

Of course, under this pension plan, like many others, an employee necessarily performs a great amount of work while accumulating 30 years' or more seniority. But contrary to petitioner's argument (Pet. Br., pp. 16–18), one cannot conclude from this fact alone that the benefits are earned in return for the work actually performed. The Court's inquiry must go further.

In *Foster*, the Court concluded that the "real nature" of vacation benefits was a "reward for and respite from a lengthy period of labor," 420 U.S. at 101, a conclusion supported by the fact that, aside

[39] Pension plans whose work requirements are expressed in hours are susceptible to the same criticism when denial of veterans' credit is based on the "substantial work requirement" theory. See, *e.g.*, *Litwicki* v. *Pittsburgh Plate Glass Ind., Inc.*, 505 F. 2d 189, 193 (C.A. 3) (1,500 hours); *Smith* v. *Industrial Employers and Distributors Ass'n*, 546 F. 2d 314, 316 n. 4 (C.A. 9) (1,500 or 1,730 hours); *LaPinta* v. *Ohio Crankshaft Div.*, 77 CCH Labor Cases ¶ 11,156, decided September 26, 1975 (N.D. Ohio), appeal pending, C.A. 6, No. 76–1158 (1,700 hours). Even after taking into consideration normal vacation, sick leave and holiday time not worked, 200 or more straight-time hours can be worked each year without additional credit. Over a period of 30 years, 6000 hours, or three working-years, goes uncompensated.

from contrived and unrealistic possibilities, the amount of the benefits reflected the work actually performed. Similiarly the Court must focus in the present case on the "real nature" of the pension, which as we have shown, is designed to provide financial security to a retiree in return for lengthy service and the surrender of his job. As such, the increase in pension benefits "would necessarily have accrued by virtue of continued employment," *Foster, supra,* 420 U.S. at 97, and is thus a perquisite of seniority. This conclusion is supported by the absence of vesting prior to 15 or 20 years of service and the fact that, since benefits in this plan reflect the length of service quite accurately, and the actual number of days or months on the job much less accurately, the benefits reward lengthy service rather than work actually performed.

There is a further significant distinction between the highly conditional long-term nature of pension payments and the short-term nature of the vacation payments at issue in *Foster*. An individual on active duty in the military receives from the government paid vacation time as well as other benefits that are rewards for day-to-day work for the United States.[40] Thus even though the Act does not as a rule [41] protect amounts of vacation pay the veteran would have earned at the plant had he not been in the

[40] See, *e.g.*, 10 U.S.C. (and Supp. V) 701.

[41] See *Foster*, *supra*, 420 U.S. at 101, in which the Court noted that vacation pay would be covered by the Act under circumstances where "it clearly appears that vacations were intended to accrue automatically as a function of continued association with the company."

armed forces, the returning veteran has not lost any ground by virtue of his military service. In fact, the award of vacation pay could result in a double benefit."

Pensions, however, present a different face. The Act protects only employees whose military service is brief." While Congress has granted long-term members of the military pension benefits," Congress has provided no equivalent benefits to returning veterans whose period of service is sufficiently brief to qualify for coverage under the Act.

In sum, as the Court stated in *Franks* v. *Bowman Transportation Co., supra,* 424 U.S. at 766, "'[m]ore than any other provision of the collective [-bargaining] agreement * * * seniority affects the economic security of the individual employee covered by its terms.'" Long term economic security is precisely what a pension provides. To obtain this security an employee must remain in the continuous service of his employer for a substantial number of years, often his entire working life. If a returning veteran reaches retirement age but is denied a measure of that

[42] See *Foster* v. *Dravo Corp.*, 490 F. 2d 55, 63 (C.A. 3); *Austin* v. *Sears, Roebuck and Co.*, 504 F. 2d 1033, 1037 (C.A. 9); *Smith* v. *Industrial Employers and Distributors Ass'n*, 385 F. Supp. 1281, 1286–1287 (N.D. Cal), affirmed on other grounds, 546 F. 2d 314 (C.A. 9).

[43] Reemployment rights under the Act are only available to persons whose total service up to and including August 1, 1961 did not exceed four years and whose total service after August 1, 1961 does not exceed five years. 38 U.S.C. (Supp. V) 2024(a), formerly 50 U.S.C. App. 459(g)(1). See *Foster, supra,* 420 U.S. at 96, n. 6.

[44] See, *e.g.*, 10 U.S.C. (and Supp. V) 1332, 1401.

security awarded to his counterparts who were never "called to the colors" he will have been "penalized" [45] by reason of his absence. That is precisely the result the Act was intended to prevent. Unless the returning veteran's pension credits are restored he "will never obtain his rightful place in the hierarchy of seniority * * *." 424 U.S. at 768."

[45] See *Fishgold, supra,* 328 U.S. at 284.

[46] See Silver, *Operation of the "Escalator Clause" in Fringe Benefit Cases,* 60 Minn. L. Rev. 45, 74 (1975) (footnotes omitted):

> The essence of *Fishgold* and the escalator clause is recognition of the unfairness of removing a person from his job, interfering with both his short- and long-term interests, satisfying the former, but doing nothing about the loss of latter. The statute therefore should be construed to require the veteran's employer to provide long-term benefits as if the veteran had earned them, even though a collective bargaining agreement may have conditioned their receipt on time actually worked.
>
> Such a construction of the statute would unify many previous attempts to determine the intent of Congress. It responds to the statement in *Fishgold* that the veteran should not "lose ground" by reason of his absence from civilian employment. The notion of losing ground points to long-term benefits. A loss of short-term benefits—a vacation in a particular year, for example—does not comport with the "loss of ground" image. Rather, the metaphor suggests that workers, especially younger ones customarily subject to military service, are engaged in building something for the future. The "race" in which ground is lost is the attempt to establish a secure future. This secure future is precisely what is meant by long-term benefits.

Under this approach, the veteran's pension benefits must be credited with the period he was called from his job:

> Failure to credit the veteran for service years [in computing pension benefits] will damage him irrevocably vis-a-vis his fellow employees who did not serve in the military. The underlying premise of the long-term/short-term approach is that Congress intended to preclude all such damage that might result from interruption of employment due to brief military service.

Silver, *supra,* at 78 (footnote omitted).

D. THE RECORD DOES NOT SUPPORT ALABAMA POWER COMPANY'S CLAIM THAT CREDITING OF MILITARY SERVICE WILL SIGNIFICANTLY ADVERSELY AFFECT THE SOUNDNESS OF ITS PLAN

Alabama Power Company suggests that a ruling in favor of the veteran "could have a significant impact upon the actuarial soundness of Alabama Power's pension fund, as well as other funds similarly situated" (Pet. Br., p. 20). But there is no evidence in this record that the plan would be endangered or even noticeably affected by such a ruling. The record does not reveal how many veterans entitled to reemployment rights the Company has on its payroll or its retired list, what their cumulative length of military service might be, or what any increased pension will cost the fund. Indeed, there is no indication even of the number of employees the Company has. The record is silent about the assets of the fund and its income. Although the Company was in a position to produce the evidence to support its claim, it did not do so.

Furthermore, the judgment in the instant case runs against Alabama Power Company as the employer liable under the Act, and thus is no different from any other liability judgment."[47] Moreover, under

[47] "Having failed to see that contributions for a past period were made when [Mr. Davis] was 'restored,' [Alabama Power Company] was in violation of the Act and, under the facts here, this caused damage * * * for which [Davis] is entitled to judgment." *Palmarozzo* v. *Coca-Cola Bottling Co.*, 69 CCH Labor Cases ¶ 13,095, p. 25,495, decided October 18, 1972 (S.D.N.Y.), affirmed, 490 F. 2d 586 (C.A. 2), certiorari denied, 417 U.S. 955. Cf. *Chastang* v. *Flynn & Emrich Co.*, 541 F. 2d 1040, 1044 (C.A. 4).

ERISA (see note 37, *supra*) the company can shift its liability to the pension fund and amortize the funding of that liability over a period of 40 years (29 U.S.C. 1082(b)(2)(B)(i)), with an additional 10-year grace period possible if approved by the Secretary of Labor (29 U.S.C. 1084(a)). Thus, any underfunding of the pension plan caused by a ruling in Davis' favor need not be immediately remedied; rather the funding can be spread out over a lengthy period of time which will greatly alleviate any alleged burden placed on the employer and the fund."[48]

[48] The regulations promulgated pursuant to ERISA provide in pertinent part that "Nothing in this section [pertaining to hours worked] shall be construed to alter, amend, modify, invalidate, impair or supersede any law of the United States * * *. Thus, for example, nothing in this section shall be construed as denying any employee credit for an 'hour of service' if credit is required by separate federal law. Furthermore, the nature and extent of such credit shall be determined under such law" (29 C.F.R. 2530.200b–2(c); 40 Fed. Reg. 41662).

The regulations also provide the following example: "During a [pension] computation period, an employee worked 40 hours a week for the first 2 weeks. The employee then began serving on active duty in the Armed Forces of the United States, which service occupied the remaining fifty weeks of the computation period. The employee would be credited with 80 hours * * * plus such credit as may be prescribed by separate Federal laws relating to military service. The nature and extent of the credit that the employee receives upon his return and the purpose for which such credit is given *e.g.*, the percentage of his or her accrued benefits derived from employer contributions which are nonforfeitable (or vested), will depend upon the interpretation of the federal law governing veterans' reemployment rights" (29 C.F.R. 2530.200b–2(d)(4); 40 Fed. Reg. 41662).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1976

NO. 76-451

ALABAMA POWER COMPANY,

Petitioner,

versus

RAYMOND E. DAVIS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF LOCKHEED-GEORGIA COMPANY, A DIVISION OF LOCKHEED AIRCRAFT CORPORATION, AMICUS CURIAE

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INTEREST OF AMICUS CURIAE

Lockheed-Georgia Company, a division of Lockheed Aircraft Corporation of Burbank, California, is engaged in the manufacture and modification of aircraft, and has its principal place of business in Marietta, Georgia. Lockheed Aircraft Corporation employs approximately 55,000 persons, over 9,000 of which work for Lockheed-Georgia Company. Both Lockheed-Georgia and Lockheed Aircraft Corporation are effectively doing business in more than one judicial circuit.

In December 1965, Lockheed Aircraft Corporation established an Hourly Employees Basic Benefit Plan and Hourly Employees Savings Plan which covers

employees of Lockheed-Georgia, and other divisions of Lockheed Aircraft Corporation. These plans were the result of collective bargaining agreements and were intended to be additional benefits for hourly employees independent of, and in addition to, the Lockheed Pension and Retirement Plans.

Under the basic benefits plan, coverage is automatic to an hourly employee in a covered group. The corporation contributes $20 per quarter for each covered employee who meets the eligibility requirements for company contributions, regardless of the employee's salary or length of service. The contribution is made to one of two trustee-managed investment trust funds of either securities or bonds. Money the account earns such as interest or dividends, is added to the account as it accrues. To be eligible to receive contribution credits, an employee must meet a substantial work requirement by being "on active status for the quarter." "Active status for the quarter" is defined by the plans and by company policy as being physically at work on more than one-half of the working days of the quarter (leaves of absence of thirty days or less considered physically at work) and being, during the remaining days of the quarter, on either a prolonged leave of absence of more than thirty days or on a layoff of less than twenty-eight days.

The savings plan is voluntary rather than automatic. An electing employee authorizes deductions from his weekly paychecks in varying amounts depending on the length of the employee's service with the company. The corporation then contributes an amount equal to 50% of the employee's deduction, and both sums go into either a securities or bond investment trust fund.

Under both plans, employees or their beneficiaries receive the unit value of all contributions upon retirement, entry into the Armed Forces, disability, lay-offs of more than four weeks, or death. In the basic benefit plan, if the employee terminates his employment for other reasons, the amount of corporate contributions he receives from the trust fund depends upon the length of service rendered the company. Contributions to the plans are intended to be rewards or additional compensation for work to be performed after establishment of the plans. No contributions are awarded for previous employment.

After establishment of these plans, Lockheed employees from time to time terminated their employment and entered the Armed Forces. Pursuant to the express terms of the basic benefit plan, all benefits accumulated as of the time of their induction were paid to the employee. The company made no further contributions to the basic benefit plan during the time these former employees were in the military service, unless in a particular quarter the employee met the work requirement of the plan. In this respect the former employee was treated like any other employee on a leave of absence of more than thirty days. Additionally, no 50% contributions were made to the savings plan during this same period since there were no corresponding employee contributions from earnings.

In December 1976, four suits were brought against Lockheed-Georgia under Title IV of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. §§ 2021-2026 (formerly section 9 of the Military Selective Service Act, *as amended*, 50 U.S.C. App. §

459).[1] These actions were brought by the United States Attorney for the Northern District of Georgia on behalf of four former employees of Lockheed-Georgia who returned to the company after serving in the Armed Forces. The complaints charged the company with violations of 38 U.S.C. § 2021 for its failure to include time spent by the employees in military service in the credit and payments of amounts under the basic benefit and savings plans. Lockheed-Georgia has answered the complaints, denying liability and proferring certain affirmative defenses.

Lockheed-Georgia became aware of the pendency of the present action when it was contacted by the United States Attorney's office representing the Plaintiffs in the above-referenced litigation. The United States Attorney's office suggested holding these cases in abeyance until this Court could decide the present action, the implication being that a decision by this Court would in some way be dispositive of the pending litigation.

This Court was likewise assured that the present case would be dispositive of a large number of pending

1. *Jack C. Martin v. Lockheed-Georgia Company*, United States District Court for the Northern District of Georgia, Rome Division, Civil Action File No. C76-172R; *Charles T. Reynolds v. Lockheed-Georgia Company*, United States District Court for the Northern District of Georgia, Atlanta Division, Civil Action File No. C76-2054A; *Kenneth H. Thompson v. Lockheed-Georgia Company*, United States District Court for the Northern District of Georgia, Rome Division, Civil Action File No. C76-171R; *Thomas J. Willis v. Lockheed-Georgia Company*, United States District Court for the Northern District of Georgia, Atlanta Division, Civil Action File No. C76-2055A.

actions. At page 6 of his memorandum in response to the Petition for Certiorari, the Solicitor General argued that ten "pension" cases are pending in district courts, and that thirty-six more are ready for filing. These cases presumably include the pending Lockheed litigation. The Solicitor General also argued that pension plans, while not identical, uniformly require work requirements in a continuous number of years and calculate the amount of pension benefits by reference to the number of years in which work is performed. Because of this similarity, the Solicitor General suggested at pages 5-6 of his memorandum that a ruling by this Court would dispose of the pending litigation.

Lockheed thus has a vital interest in the present case. As a division of a nationwide employer, with facilities in several judicial circuits, it is concerned with the impact of conflicting decisions among circuit courts regarding the employment rights of servicemen. As a major defense contractor, with a large number of veteran employees, the effect of a decision in this case on Lockheed's benefit programs will be significant. Furthermore, Lockheed-Georgia is a defendant in pending litigation involving fringe benefits which are not pensions, and which present related, but fundamentally distinct questions not specifically before the Court in the present case. Lockheed-Georgia does not therefore wish to become homogenized into a class of defendant/employers whose fringe benefit programs will be effectively adjudicated by a holding in this case, under the guise that a ruling herein will be dispositive of all pending and related fringe benefit litigation.

Because of the importance of the issues raised in

this case, Lockheed-Georgia sought and received consent of Petitioner and Respondent to file its brief amicus curiae.[2] Hence, Lockheed-Georgia files this brief to present views on the serious questions raised which it believes may not be fully or adequately presented by the parties.

SUMMARY OF ARGUMENT

The Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. § 2021 (formerly codified as the Military Selective Service Act at 50 U.S.C. App. § 459) provides two separate mandates. The first requires that a returning veteran be restored to his former job or like position "without loss of seniority, status, and pay" and the second entitled returning veterans to participate "in insurance and other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence." 38 U.S.C. § 2021(b)(1). It thus seems clear that Congress intended to treat "seniority" perquisites, which have to be categorically restored to a veteran, differently from "other benefits," which are subject only to nondiscriminatory restoration. The statute, however, fails to define what rights are perquisites of seniority and what are other benefits. Nevertheless, in this Court's opinions in *Accardi v. Pennsylvania R.R.*, 383 U.S. 225, 86 S.Ct. 768, 15 L.Ed.2d 717 (1966), *Eagar v. Magma Copper Co.*, 389 U.S. 323, 88 S.Ct. 503, 19 L.Ed.2d 557 (1967), and *Foster v. Dravo Corp.*, 420 U.S. 92, 95 S.Ct. 879, 43 L.Ed.2d

2. The written consent of both parties to this action is attached to the Proof of Service for this brief filed with the Clerk of this Court.

44 (1975), a definition and concept of seniority have remained constant: the Court has been unwilling to apply the seniority provisions of the veterans' statute to a benefit that is conditioned upon compliance with a *bona fide* prospective work requirement. This Court's analysis has been traced by the lower federal courts, except in the case *sub judice*, when considering pension benefits.

On the basis of this definition and concept of seniority, the decision below should be reversed.

ARGUMENT

On the eve of World War II, Congress enacted the Selective Training and Service Act of 1940, 54 Stat. 885, section 8 of which provided for the reemployment rights of qualified veterans. These provisions have been periodically reenacted without significant change and are now codified as the "Vietnam Era Veterans' Readjustment Assistance Act of 1974" at 38 U.S.C. § 2021. In pertinent part the statute reads (with emphasis added where appropriate):

> (a) In the case of any person who is inducted into the Armed Forces of the United States under the Military Selective Service Act (or under any prior or subsequent corresponding law) for training and service and who leaves a position (other than a temporary position) in the employ of any employer in order to perform such training and service, and (1) receives a certificate described in section 9(a) of the Military Selective Service Act (relating to the satisfactory completion of military service), and (2) makes application for reemploy-

ment within ninety days after such person is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year —

* * * *

(B) If such position was in the employ of a State, or political subdivision thereof, or a private employer, such person shall —

(i) if still qualified to perform the duties of such position, be restored by such employer or his successor in interest to such position or *to a position of like seniority, status, and pay*; . . . .

* * *

(b) (1) Any person who is restored to or employed in a position in accordance with the provisions of clause (A) or (B) or subsection (a) of this section *shall be considered as having been on furlough or leave of absence during such person's period of training and service in the Armed Forces, shall be so restored or reemployed without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces*, and shall not be discharged from such position without cause within one year after such restoration or reemployment.

(2) *It is hereby declared to be the sense of the Congress that any person* who is restored to or employed in a position in accordance with the pro-

visions of Clause (A) or (B) of subsection (a) of this section *should be so restored or reemployed in such manner as to give such person such status in his employment as he would have enjoyed if such person had continued in such employment continuously from the time of such person's entering the Armed Forces until the time of such person's restoration to such employment, or reemployment.*

* * *

Summarizing the relevant portions of the statute, an employer must restore a qualified veteran to his pre-service position, or one of "like seniority, status, and pay," 38 U.S.C. § 2021(a)(B)(i), must consider a returning veteran "as having been on furlough or leave of absence," 38 U.S.C. § 2021(b)(1), must restore the employee "without loss of seniority," 38 U.S.C. § 2021(b)(1), and must permit him "to participate in insurance and other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted." 38 U.S.C. § 2021(b)(1).

The purpose of the veterans' statute is obvious: "to protect veterans returning to civilian jobs from being penalized for having served in the Armed Forces." *Foster v. Dravo Corp.*, 420 U.S. 92, 93, 95 S.Ct. 879, 43 L.Ed.2d 44, 48 (1975). To this end Congress provided that a returning veteran (1) shall be "restored or reemployed without loss of *seniority*," and (2) "shall be entitled to participate in insurance or *other benefits* offered by the employer" to the same extent as if he had been on furlough or leave of absence. 38 U.S.C. § 2021(b)(1) (emphasis added). It seems clear that

Congress intended to treat "seniority" perquisites, which have to be categorically restored to a veteran, differently from "other benefits," which are subject only to nondiscriminatory restoration. The statute, unfortunately, fails to define what rights are perquisites of seniority and what are other benefits. It is the statutory ambiguity, as this Court is well-aware, which has resulted in frequent litigation "to define each of these terms and to determine their proper application to contemporary bargaining agreements, which commonly govern an extremely broad range of the conditions of an employer-employee relationship" (*e.g.*, vacation pay, sick leave, pensions, life insurance, health care, and supplemental unemployment payments). Silver, *Operation of the "Escalator Clause" in Fringe Benefit Cases*, 60 Minn. L. Rev. 45, 47-48 (1975).

At least in part, the difficulty with application of the statute lies in its implicit assumption that benefits of employment are either totally dependent on seniority or not dependent on seniority at all. *See* Ross, *Returning Veterans' Rights to Fringe Benefits After Foster v. Dravo Corporation*, 68 Military L. Rev. 55, 56-57 (1975). As stated by the Ninth Circuit Court of Appeals, "[t]he statute assumes that there exists a distinct line between rewards for status and compensation for work." *Smith v. Industrial Employers & Distributors Association*, 546 F.2d 314, 317 (9th Cir. 1976). But as further noted in the *Smith* case:

> In reality many benefits . . . recompense employees for both status and work. These hybrids are out of place in a system which recognizes only purebreds. Hence, we must "unmix" the benefit in a way never foreseen by the contracting parties or the Congress, to determine which characteristics trace their lineage to seniority.

Smith v. Industrial Employers & Distributors Association, supra, 546 F.2d at 317, *citing, Accardi v. Pennsylvania R.R.*, 383 U.S. 225, 229-31, 86 S.Ct. 768, 15 L.Ed.2d 717, 720-722 (1966) and Haggard, *Veterans' Reemployment Rights and the Escalator Principle*, 51 B.U.L. Rev. 539, 577 (1971).

As long as litigation under the statute centered on benefits which were traditionally considered seniority rights (*e.g.*, lay-off, recall, and promotion), no great problem was raised by the arbitrariness of the statute's classification. *See, e.g., McKinney v. Missouri-Kansas-Texas R.R.*, 357 U.S. 265, 78 S.Ct. 1222, 2 L.Ed.2d 1305 (1958); *Siaskiewicz v. General Electric Co.*, 166 F.2d 463 (2nd Cir. 1948). However, in recent years, as litigation has turned to benefits which accrue only in part (or not at all) as a result of seniority, and in part as a reward or compensation for work actually performed (such as vacation pay and severance benefits), the difficulties inherent in the application of the statute have become evident. As a result, this Court has been increasingly called upon to establish principles of decision for a uniform approach in benefit cases.

The first step taken by the Court to extend the protection of the veteran statute to a benefit never before treated as a traditional element of seniority was *Accardi v. Pennsylvania R.R.*, 383 U.S. 225, 86 S.Ct. 768, 15 L.Ed.2d 717 (1966). The issue in *Accardi* involved the payment of severance benefits to tugboat firemen whose jobs were abolished. The amount of

the benefit was to be based on the number of years of "compensated service," to be calculated by crediting any year in which an employee worked at least one day in no less than seven different months. Suit was brought by veteran-employees when the company refused to consider their military service as "compensated service."

In *Accardi*, this Court announced its intention to define "seniority" without limiting it to its traditional meaning, and without limiting it to the meaning given it under collective bargaining agreements. The Court found that the real nature of the benefit was compensation for loss of jobs, and the most accurate characterization of the benefit to be for loss of seniority. In so finding, the Court evidenced an unwillingness to be bound by definitions in a collective bargaining agreement.

The *Accardi* opinion was doubtless an important interpretation of the statute. It has been cited by subsequent courts in support of extending to veterans virtually every type of fringe benefit available. *See, e.g., Locaynia v. American Airlines, Inc.*, 457 F.2d 1253 (9th Cir.), *cert. denied*, 409 U.S. 982, 93 S.Ct. 317, 34 L.Ed.2d 246 (1972); *Connett v. Automatic Electric Co.*, 323 F.Supp. 1373 (N.D.Ill. 1971). It could well be cited for the proposition that veterans are entitled to wages, since arguably wages would "automatically accrue" but for induction into the service. *See*, Ross, *Returning Veterans' Rights to Fringe Benefits After Foster v. Dravo Corporation*, 68 Military L. Rev. 55 (1975); Silver, *Operation of the "Escalator Clause" in Fringe Benefit Cases*, 60 Minn. L. Rev. 45 (1975).

But the opinion was limited in an important respect. The Court indicated a reluctance to treat as "seniority" a benefit that was conditioned on a valid and *bona fide* work requirement. The argument that the work requirement in *Accardi* made the payments in question deferred compensation failed, the Court properly noting that an employee could obtain credit for a full year's service by working only seven carefully selected days. This "bizarre result," occasioned by a sham and transparent work requirement, showed that the payments were for longevity and not for time actually worked. Nevertheless, the Court in *Accardi* indicated that under the scheme of the veterans' statute, compensation conditioned on a *bona fide* work requirement was more likely to be considered "other benefits," in the nature of deferred compensation, and less likely to be considered "seniority."

It should be noted that in *Accardi* payments were made on the basis of retrospective calculations. The severance plan in *Accardi* was an attempt to compensate employees for work performed in the past. The benefit was negotiated retrospectively, and therefore could not have the necessary relationship between benefit and work performed that is found in benefit plans negotiated and calculated prospectively. Plans of this type, such as Lockheed's, are negotiated as part of an hourly economic compensation package for work actually performed. Furthermore, the costs of these plans are part of the overhead burden for government contractors such as Lockheed that is recognized by the Federal government in the negotiation of, and payments under, contracts only to the extent that these costs are identified at the time of the negotiation or payment.

Approximately one year after *Accardi*, the Court again considered the scope of the veterans' statute. In *Eagar v. Magma Copper Co.*, 389 U.S. 323, 88 S.Ct. 503, 19 L.Ed.2d 557 (1967) (per curiam), the collective bargaining agreement required that employees work at least 75% of their available shifts within a year, and also required that they be employed with the company on the one-year anniversary date of their employment in order to qualify for vacation benefits. Eagar had actually worked more than 75% of the available shifts since he began his employment on March 12, 1958, but was called to active duty on March 6, 1959 — seven days before the anniversary date of his employment. Considering compliance with actual work requirements, Eagar had fully earned his vacation pay. He was denied his benefits solely because he was not at work on an arbitrary date.

The Court reversed a decision refusing Eagar his vacation benefits in a per curiam opinion only citing *Accardi*. Eagar had complied with the *bona fide* work requirement of his employer by working 75% of his shifts. Requiring presence at work on an arbitrary date was not considered to be a valid work requirement, but more a function of longevity or seniority.

Eagar is, therefore, entirely consistent with this Court's earlier opinion in *Accardi*. In both cases, the Court indicated a reluctance to treat as a perquisite of seniority a benefit conditioned on a valid and *bona fide* work requirement.

The most recent pronouncement by this Court on the application of the veterans' statute is its opinion in *Foster v. Dravo Corp.*, 420 U.S. 92, 95 S.Ct. 879, 43

L.Ed.2d 44 (1975). In *Foster*, the plaintiff worked for nine weeks in 1967 and then entered the Armed Forces. He also worked for thirteen weeks in 1968 upon his release from active duty. However, the company's collective bargaining agreement required an employee to be on the job at least twenty-five weeks in any calendar year to qualify for vacation pay, which was a *bona fide* work requirement. The Court, in affirming a denial of Foster's claim for vacation pay in both 1967 and 1968, deferred to the presence of a real — not illusory — work requirement, a factor significantly absent in both *Accardi* and *Magma Copper*. According to the Court:

> Generally the presence of a work requirement is strong evidence that the benefit in question was intended as a form of compensation . . . . [W]here the work requirement constitutes a bona fide effort to compensate for work actually performed, the fact that it correlates only loosely with the benefit is not enough to invoke the statutory guarantee.

Foster v. Dravo Corp., supra, 420 U.S. at 99, 43 L.Ed.2d at 52.

Despite the variety of benefits and plans involved in the veteran cases to come before the Court, its analysis has remained constant. The Court has been unwilling to apply the seniority provisions of the veterans' statute to a benefit — any benefit — that is conditioned upon compliance with a *bona fide* work requirement. The teachings of *Accardi* and *Magma Copper*, that the Court will not be bound by the labels placed on benefits by the parties, nor misled by work requirements that are illusory or transparent, do not indicate otherwise. At bottom, if a work require-

ment is substantial and *bona fide*, a benefit premised on that requirement must be earned on the job by a returning serviceman, just as it must be earned by his colleagues, whether or not they had prior military service.

There thus emerges from these opinions a definition of seniority that is useful in analyzing all types of benefits. This definition is articulated in the recent Ninth Circuit opinion of *Smith v. Industrial Employers & Distributors Association*, 546 F.2d 314, 317 (9th Cir. 1976):

> In general, then, we may define seniority benefits as those which reward longevity, not those which compensate for work actually performed. *See also Foster v. Dravo Corp.*, 1975, 420 U.S. 92, 97, 95 S.Ct. 879, 43 L.Ed.2d 44; *Austin v. Sears, Roebuck & Co.*, 9th Cir., 1975, 504 F.2d 1033, 1035.

One can see this definition at work in the lower Federal court decisions that have dealt with pension benefits.

The first case ever to apply the provisions of the statute to funded pension benefits was *Litwicki v. Pittsburgh Plate Glass Industries, Inc.*, 505 F.2d 189 (3rd Cir. 1974), a case which although decided before *Foster v. Dravo Corp.*, presaged its analysis and reasoning. The pension plan under consideration in that case provided that the amount of an employee's benefits were determined by the number of hours *actually worked* by the employee (some 1,500 hours were needed to obtain credit for a full year). The Third Circuit, noting that "[t]his work requirement is inconsistent with an intent to accord pension benefits on the basis of an employee's longevity with PPG," held that the

benefits provided by the plan were not "perquisites of seniority under the Act" but were essentially "deferred compensation based upon a substantial work requirement." *Litwicki v. Pittsburgh Plate Glass Industries, Inc., supra*, 505 F.2d at 193. Although the particular plan under review in *Litwicki* led the court to conclude that the pension agreement itself required that military service time be credited toward the vesting (but not amount) of pension rights, the court explicitly held that "neither for purposes of vesting nor for purposes of calculating amount of pension benefits, does the Act require that credit be given for military service." *Id.* at 193.

The *Litwicki* analysis has been embraced by all the Courts of Appeals which have subsequently considered pension plans and the statute, except the Fifth Circuit in the instant case. For example, in *Jackson v. Beech Aircraft Corp.*, 517 F.2d 1322 (10th Cir. 1975), the court, relying on both *Litwicki* and *Foster*, held that retirement benefits, eligibility for longevity pay, length of vacation, and sick leave credits — all tied to a substantial *bona fide* work requirement — were not seniority rights protected by the statute. Consequently, the corporation's returning veterans were not entitled to credit for their service time in computing the benefits due them.

Likewise, in *La Pinta v. Ohio Crankshaft Division, Park-Ohio Industries, Inc.*, 77 CCH Labor Cases ¶ 11,156 (N.D.Ohio 1975), *appeal pending*, Sixth Circuit No. 76-1158, the court held that a returning serviceman was not entitled, under either the statute or his employer's plan, to credit for his time spent in military service, either for the calculation of the amount of his

pension or for the vesting of his pension rights. The court so held because the company's plan represented a form of deferred compensation which rewarded and compensated for actual work performed (some 1,700 hours being needed for full credit for a year) and was not a disguised perquisite of seniority.

The most recent circuit court decision to consider the question of pension benefits is *Smith v. Industrial Employers & Distributors Association*, 546 F.2d 314 (9th Cir. 1976). In *Smith*, a veteran sought to obtain credit under a pension plan for years of military service when he was absent from employment. An important distinction is emphasized in *Smith* because of the effective date of the pension plan. The plan in *Smith* was established in 1956, and provided for benefits on the basis of both future and past employment.

As to future employment, there was a substantial work requirement. The court had little trouble in holding that such prospective benefits were conditioned on compliance with a valid work requirement and, therefore, constituted earned compensation, not perquisites of seniority. Post-employment credits were given under the plan for employment prior to the institution of the plan. Although these credits were computed with reference to actual past employment, the court concluded that they were in effect rewarding longevity, not actual work on the job. Therefore, the pre-plan credits were properly classified as perquisites of seniority. *Smith v. Industrial Employers & Distributors Association*, *supra*, 546 F.2d at 314.

Smith, is thus completely consistent with this Court's previous opinions interpreting the veterans' statute, most notably *Accardi*. In *Accardi*, the employ-

er was essentially rewarding longevity by instituting a severance pay plan that compensated only for pre-plan work. There were no credits for future employment because the jobs in question were being discontinued. The real, and in fact only nature of the *Accardi* benefits, and the pre-plan benefits in *Smith*, was reward for longevity — not compensation for work to be performed after the establishment of the plan.[3]

The only case to hold that pension benefits should be considered as perquisites of seniority, as opposed to compensation for work performed, is the case *sub judice*. The error in this decision is readily apparent when examined in light of this Court's earlier opinions previously discussed herein.

The terms and conditions of the Alabama Power Company pension plan are fully set forth in the Appendix filed in this case at pages 54-102. Under this plan, although there is a substantial work requirement, the number of hours worked bears no direct relation

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3. The Lockheed basic benefit plan is not a pension plan or a wage security plan. When it was initiated there was no provision made to reward employees for employment predating the plan, as has been the practice followed by many employers which have established pension plans or income maintenance plans when faced with unanticipated large scale lay-offs. The Lockheed plan has no provisions for pre-plan contributions—it began in 1965 and under it the company pays $20 a quarter for every quarter after the adoption of the plan an employee is "on active status for the quarter." Thus, unlike the plans interpreted in both *Accardi* and *Smith*, the Lockheed basic benefit plan rewards only future employment, and benefits accruing under the plan can be considered only as deferred compensation predicated on a substantial work requirement, not perquisites of seniority.

to the amount of benefits received. In the absence of this direct relationship, the district judge herein mistakenly assumed that the plan was compensation, not on the basis of actual work, but on the basis of seniority. *Davis v. Alabama Power Co.*, *supra*, 383 F. Supp. 880, 887, 889 (N.D.Ala. 1974), *aff'd*, 535 F.2d 657 (5th Cir. 1976). The Fifth Circuit offered no new analysis, it merely adopted the district court's opinion without comment.

This opinion was written, however, without the benefit of this Court's analysis in *Foster v. Dravo Corp.*, 420 U.S. 92, 95 S.Ct. 879, 43 L.Ed.2d 44 (1975). As discussed, *Foster* teaches that where a work requirement "constitutes a bona fide effort to compensate for work actually performed, the fact that it correlates only loosely with the benefit is not enough to invoke the statutory guarantee." *Foster v. Dravo Corp.*, *supra*, 420 U.S. at 99-100, 43 L.Ed.2d at 52. This Court in *Foster* expressly refused to adopt an argument similar to the one made by the plaintiff in *Davis* that there had to be such a close correlation. In light of *Foster*, the decision in the present case should be reversed.

CONCLUSION

The preceding analysis is not meant to be an exhaustive survey of all the cases which purport to deal with veterans' reemployment rights. However, it is clear that under this Court's recent pronouncements, as interpreted by the great majority of lower Federal courts that have considered the veterans' statute, the decision in the case *sub judice* is erroneous. The district court's holding, affirmed and adopted by the Court of Appeals, that a direct relationship between actual work and benefits received is needed in order to consider a fringe benefit as compensation, rather than as a perquisite of seniority, was based on a mistaken assumption which this Court dispelled in *Foster*. Therefore, the decision below should be reversed.

Respectfully submitted,

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NO. 76-451

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

ALABAMA POWER COMPANY,
Petitioner,
v.
RAYMOND E. DAVIS,
Respondent.

On Writ of Certiorari To The United States Court of Appeals For The Sixth Circuit

BRIEF FOR PPG INDUSTRIES, INC. AS AMICUS CURIAE

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BRIEF FOR PPG INDUSTRIES, INC. AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

Pursuant to Rule 42(a) of the Rules of Court, all parties to the case have consented in writing to the filing of this brief and the participation of PPG Industries, Inc. (previously known as Pittsburgh Plate Glass Company) as amicus in this case.

PPG Industries, Inc. has more than fifty pension agreements at its various facilities throughout the United States. These pension agreements condition pension benefits upon bona fide work requirements. For this reason, PPG Industries, Inc. has a direct interest in the issues presented for the Court's consideration in this case.

SUMMARY OF ARGUMENT

Pension rights are not attributes of seniority. Pensions are deferred compensation for services rendered with payments commencing at retirement. Pensions are distinguishable from severance payments which are based usually upon seniority and are designed to alleviate the immediate hardships caused by the loss of the employee's job. On the other hand, a pension payable at retirement age does not protect an employee against the harsh economic consequences of an involuntary lay-off since the pension benefit is not payable at the time of lay-off.

With reference to contractually negotiated fringe benefits, veterans should not be entitled to any benefits under the Military Selective Service Act, 62 Stat. 614, as amended, 50 U.S.C. App. Sec. 459(b) & (c) (hereinafter referred to as the "Act"), unless they have complied with the bona fide work requirements which are contractual conditions precedent for employee entitlement to such benefits. In its most elemental structure, if a pension agreement specifies that "X" cents will be put into an employee's retirement fund for each hour that he works, the resulting pension is clearly a deferred wage and not a perquisite of seniority. Such a conclusion should also follow whenever an employee's pension benefit requires compliance with a significant work requirement.

ARGUMENT

A. Pensions Are Not Perquisites of Seniority

The present veterans reemployment provisions had their genesis in the Selective Service Act of 1940, 54 Stat. 885, 890. Over the years, the sections involved in the present litigation have been largely unchanged.[1]

In 1940, the development of private pension plans were in their infancy. Benefit payments to private employees in 1940 were one hundred forty million dollars.[2] During the years from 1930 to 1942, the Bureau of Internal Revenue approved only 1,360 plans covering 980,100 employees.[3] Thus, it is a fair assumption that Congress did not contemplate a pension as being an attribute of seniority as the term was then understood by union and management.

Pensions are not seniority rights, but are benefits paid upon retirement with funds accumulated for the employee in lieu of an increase in current wages. The concept that pensions are wages is well established and consistently recognized under the National Labor Relations Act since *Inland Steel Co. v. NLRB,* 170 F.2d 247 (7th Cir. 1948), cert. denied, 336 U.S. 960 (1949), cert. granted on another point and aff'd 339 U.S. 382 (1950).

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1. *See Foster v. Dravo Corp.,* 420 U.S. 92, 96 and n 6. (1975)

2. Social Security Bulletin, Statistical Supplement, 1965; R. Murray, Economic Aspects of Pensions a Summary Report, National Bureau of Economic Research Inc., p. 15.

3. C. Dearing, Industrial Pensions, Brookings Institution p. 37, citing U.S. Bureau of Internal Revenue, "Pension Trust Statistical Table," Table 2 (August, 1946) mimeo.

In 1956, the Senate Subcommittee on Welfare & Pension Funds declared:

> "These employer-employee plans, whether or not collectively bargained, or whether contributed solely by management, or on a joint management-employee basis, actually, and under existing law, proceed on the basis that the contributions to them by management are in the nature of employees compensation for employment or stated in another way . . . 'that the cost of any employee's service is greater than the amount currently paid him as wages.'" S. Rep. No. 1734, 84th Cong. 2nd Sess. 3 (1956)

To the same effect, in reporting a bill which became the Welfare and Pension Plans Disclosure Act, the Senate Committee on Labor and Public Welfare stated:

> "Regardless of the form they take, the employers' share of the cost of these plans or the benefits the employers provide are a form of compensation." S. Rep. No. 1440, 85th Con., 2nd Sess. 4 (1958)

Accardi v. Pennsylvania R.R., 383 U.S. 225 (1966) is distinguishable. The railroad claimed that firemen were not necessary on new diesel tugs and sought to abolish the job of firemen. After a strike, the union and the railroad agreed to abolish the position of firemen on all diesel tugs. A displaced fireman (a veteran) claimed severance pay.

The employer in *Accardi* contended that the severance payments, in essence, were deferred compensation for work previously performed. The Court did not accept this argument because there was no correlation between the amount of work required and the amount of severance pay. An employee who worked a mere seven days a year, but who continued on the seniority rolls for the remainder of the year, would be entitled to the same severance pay as an employee who worked every day of the year. This unrealistic relationship of the benefit to hours worked prompted the Court to conclude that the result was "bizarre." The benefit was in reality based upon seniority and not upon hours worked.[4]

Thus, *Accardi* is distinguishable from the instant case. In *Accardi,* the United States Supreme Court concluded that the requirement that an employee work only seven days in a year in order to be credited with a year of compensated service in calculating his severance pay was a mere sham because the required work time was negligible. In the instant case, there is a significant and substantial work requirement.

Furthermore, there is a significant practical distinction between severance payments or supplemental unemployment benefits and pension benefits. A severance plan or supplemental unemployment plan enables an employee who loses his job to provide for the immediate needs of his family and protect himself against some of the economic losses resulting from his unemployment. The severance benefit will be available for medical expenses, mortgage payments and other living expenses. On the other hand, a deferred pension benefit which an employee is eligible to receive when he attains age 65 and which he forfeits if he dies before reaching that age provides no protection for the loss of his job. Functionally pensions are primarily designed to meet the need for an assured income after a person's working life.

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4. Thomas R. Haggard, Veterans Reemployment Rights and the Escalator Principle, 51 B.U.L. Rev. 539, 571 (1971).

Pensions provide economic benefits during that inevitable period in life when an individual is no longer physically or mentally capable of earning a living. On the other hand, severance benefits and employment benefits compensate an employee for the loss of his right to exercise his seniority to maintain active employment with his employer. Hopefully, an employee will never have to receive unemployment benefits or severance pay, but the need for an income during old age is incapable of being avoided. Thus, pensions are not a perquisite of seniority, per se, and an analysis of the existing labor agreement is necessary to determine the proper classification of pension under the veterars' reemployment statutes.

B. Benefits Conditioned Upon Bona Fide Work Requirements Are Not Seniority Rights

Since Congress did not define the term "seniority," this term "derives its content from private practices and agreements." *Accardi v. Pennsylvania R.R., supra* at 229. However, *Accardi* concluded that private employers had to comply with Congressional intent and that this "intention was to preserve for the returning veterans the rights and benefits which would have automatically accrued to them had they remained in private employment . . ." *Accardi v. Pennsylvania R.R., supra* at 229

Thereafter, the Court has consistently applied the veterans' reemployment statute "to assure that benefits and advancements that would necessarily have accrued by virtue of continued employment would not be denied the veteran merely because of his absence in military service." *Foster v. Dravo Corp.,* 420 U.S. 92 at 97 (1975); see also *McKinney v. Missouri-Kansas-Texas R. Co.,* 357 U.S. 265, 272 (1958) Seniority is a benefit which flows inexorably as a consequence of the legal relationship of employer-employee. However, when a contractual benefit is conditioned upon actual hours worked or actual days of work the contractual condition must be satisfied before the veteran is entitled to the benefit.[5]

In *Foster v. Dravo, supra,* this Court aptly reasoned as follows:

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5. Thomas R. Haggard, Veterans Reemployment Rights and the Escalator Principle, 51 B.U.L. Rev. 539, 527 (1971); Note—Veterans Rights Under The Universal Military Training and Service Act—Seniority Provisions, 1 Ga. Law Rev. 293, 307-308 (1967).

> "... Generally, the presence of a work requirement is strong evidence that the benefit in question was intended as a form of compensation... But where the work requirement constitutes a bona fide effort to compensate for work actually performed, the fact that is correlates only loosely with the benefit is not enough to invoke the statutory guarantee." 420 U.S. 99-100

Thus, the Court in *Foster* held that a returning veteran was not entitled a vacation benefit unless he had complied with the work requirement of the labor agreement.

The Third Circuit in *Litwicki v. Pittsburgh Plate Glass Industries, Inc.*, 505 F.2d 189 (3rd Cir. 1974), applying the work requirement test to a pension agreement held:

> "Our analysis of this pension agreement leads us to the firm conclusion that the benefits therein provided are not perquisites of seniority under the Act. These pension benefits essentially are deferred compensation based upon a substantial work requirement. Thus we hold that, neither for purposes of vesting nor for purposes of calculating amount of pension benefits, does the Act require that credit be given for military service." 505 F.2d at 193.

The Tenth Circuit in *Jackson v. Beech Aircraft Corp.*, 517 F.2d 1322 (10th Cir. 1975) likewise held that pension benefits are not seniority benefits, but are deferred compensation based on a substantial work requirement. The Courts in *Litwicki* and *Jackson* correctly interpreted the Act. Veterans are not entitled to wages during the period of military service.

The Court in *Aeronautical Industrial District Lodge v. Campbell*, 337 U.S. 521, at 526 (1949) stated "seniority rights derive their scope and significance from union contracts." The terms of the Alabama Power Company's pension agreement compel the conclusion that pension rights for both vesting and benefit purposes are conditioned upon a substantial work requirement and are not a seniority right.

CONCLUSION

For the reasons stated above, the amicus curiae urges the Court to reverse the judgment of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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